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IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

THE HONORABLE ALCEE L. HASTINGS,
UNITED STATES DISTRICT JUDGE,
Petitioner,

v.

THE JUDICIAL CONFERENCE OF THE UNITED STATES, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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Petitioner.

JANUARY 30, 1986

QUESTIONS PRESENTED

1. Should the ripeness doctrine be applied to defer adjudicating the facial constitutionality of the provisions of the five-year old, fully implemented Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 (the "Act")?

2. Are the powers assigned and the procedures established by the Act to regulate the conduct of federal judges consistent with the allocation of powers and procedures mandated by the Constitution to keep separate the powers of government and to guarantee that federal judges will have the independence necessary to enable the federal courts to maintain the proper separation?

3. Did the court of appeals correctly hold that a federal judge who has claimed that the Constitution guarantees

him the right to be free from the obligation to endure the burdens being imposed by the administrative proceedings being conducted against him under the Act must endure the burdens of the challenged proceedings before his claims will be ripe for adjudication?

4. Does the manner in which the Act has been implemented in the Eleventh Circuit and has been (and is being) applied in proceedings against the plaintiff federal judge irreparably and unconstitutionally interfere with his rights as a United States judge and as an individual?

PARTIES IN THE COURT OF APPEALS

The appellant in the court below and the petitioner here is the Honorable Alcee L. Hastings, a United States district judge in active service on the United States District Court for the Southern District of Florida. The appellees below

and respondents here are the Judicial Conference of the United States; the Honorable Warren E. Burger, Chief Justice of the United States; the Judicial Conference's Committee to Review Circuit Council Conduct and Disability Orders; the Judicial Council of the Eleventh Circuit; the Honorable John C. Godbold, Chief Judge of the Eleventh Circuit; the Honorable Gerald Bard Tjoflat and the Honorable Frank M. Johnson, Jr., circuit judges in active service on the United States Court of Appeals for the Eleventh Circuit; the Honorable Sam C. Pointer (N.D. Ala.) and the Honorable William C. O'Kelley (N.D. Ga.), district judges in active service on district courts within the Eleventh Circuit; and the Attorney General of the United States, the Honorable William French Smith in the court below and the Honorable Edwin Meese III in this Court.

The Washington Legal Foundation filed a brief as amicus curiae in support of appellees in the court of appeals.

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In the
SUPREME COURT OF THE UNITED STATES
October Term, 1985

THE HONORABLE ALCEE L. HASTINGS,
UNITED STATES DISTRICT JUDGE,
Petitioner,

v.

THE JUDICIAL CONFERENCE OF THE UNITED STATES, et al.,
Respondents.

PETITION

United States District Judge Alcee L. Hastings petitions this Court to issue a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit to review the judgment that court entered against him.

OPINIONS BELOW

The opinion of the court of appeals is reported as Hastings v. Judicial Conference of the United States, 770 F.2d 1093 (D.C. Cir. 1985), and is set out

in the appendix to this petition at A.1-84. The district court filed a memorandum opinion with its final order that is reported as Hastings v. Judicial Conference of the United States, 593 F. Supp. 1371 (D.D.C. 1984), and is set out in the appendix at A. 85-144.

JURISDICTIONAL STATEMENT

The judgment of the court of appeals was entered on August 13, 1985 (A. 145). That court entered orders denying rehearing and rehearing en banc on November 1, 1985 (A. 147-49). The present petition was filed within the period specified by 28 U.S.C. § 2101 (c) (1982). The Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1)(1982).

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case concerns the constitutionality of the Judicial Councils Reform and Judicial Conduct and Disability Act of

1980, Pub. L. No. 96-458, 94 Stat. 2035 (1980), codified at 28 U.S.C. §§ 331, 332, 372(c), 604(h)(1982). The provisions of that act are set out in the appendix at A. 159-85. The case also concerns the rules adopted by the Judicial Council of the Eleventh Circuit pursuant to the Act. Rule for the Conduct of Complaint Proceedings Under 28 U.S.C.A. § 372(c), published as Addendum III, Rules of the United States Court of Appeals for the Eleventh Circuit, at 28 U.S.C.A. Rules, 1985 Pocket Part at 282 (West). The provisions of those rules are set out in the appendix at A. 186-201.

Resolution of the constitutional questions presented would involve the following provisions of the Constitution of the United States: U.S. Const., art. I, § 1 (legislative powers), § 2, cl.5 (power of impeachment), § 3, cls. 6 and 7

(trial and judgments on impeachment), § 8, cl. 9 (inferior courts) and cl. 18 (necessary and proper); art. II, § 1, cl. 1 (executive power), § 2, cl. 2 (appointments), § 4 (impeachments); art. III, § 1 (tenure and compensation), § 2 (judicial power); amends. I (free speech and redress of grievances); V (due process). Those provisions are set out in the appendix at A. 152-58.

STATEMENT OF THE CASE

The Nature of the Action

This action challenges the constitutionality of the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 (the "Act"), Pub. L. No. 96-458, 94 Stat. 2035 (1980), codified at 28 U.S.C. §§ 331, 332, 372(c), 604(h) (1982), and of the manner in which it has been implemented and applied in one federal circuit.[1]

1. Unless otherwise needed for clarity, parallel citations to sections of the Act

The Act assigns the Judicial Conference of the United States (the "Conference"), the Chief Justice, and the judicial council and chief judge of each circuit power to investigate and sanction any United States judge whose conduct does not satisfy the norms they prescribe. Their exercise of these powers is subject to no check in any other branch, and their actions may not be reviewed by any court. The Act has been fully implemented, and these agencies and officers have exercised their assigned powers. This action was brought on behalf of one of the United States district judges against whom those powers are being exercised.

The Proceedings Below

Petitioner asked the district court to enter a judgment declaring that the Act

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as they have been codified in 28 U.S.C. (1982) will refer to the section number only [e.g., 28 U.S.C. § 372(c)(1) will be cited as "§ 372(c)(1)"].

is invalid on the ground that it improperly assigned legislative and executive powers to administrative officers and agencies of the judicial branch and combined legislative, executive, and adjudicative powers and authorized their exercise in a manner that could not be reconciled with the express provisions of the Constitution or the purposes for which those provisions were adopted (count one). In the alternative, petitioner asked the district court to enjoin the proceedings against him on the ground that the manner in which the Act had been implemented in the Eleventh Circuit and construed and applied in the proceedings against him was irreparably and impermissibly depriving him of fundamental constitutional rights guaranteed him as a federal judge and as an individual (count two).[2]

2. Petitioner asserted additional claims

The parties and the district court agreed that these claims should be initially raised by motions addressed to the court's jurisdiction and the merits. To that end, respondents filed a motion asking the court to dismiss the claims asserted in count one and certain of the claims asserted in count two on the ground that they were not ripe. Petitioner and respondents filed cross-motions seeking summary judgment on both those counts.[3]

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under the Constitution and under the Privacy Act of 1974, 5 U.S.C. § 552a (1982). He does not ask this Court to review the lower courts' dismissal of those claims.

3. A two-volume Preliminary Appendix was filed in support of Plaintiff's Motion for Summary Judgment: Counts I and II, Hastings v. Judicial Conference, No. 83-3850 (D.D.C. 1984). The Material Facts stated in this petition (infra at 9-33) are taken from documents included in that Preliminary Appendix and in the Appendix to Briefs and Supplemental Appendix filed in the court of appeals in Hastings v. Judicial Conference, No. 84-5576 (D.C. Cir. 1985).

The district court found the claims directed at the facial validity of the Act ripe for adjudication (A. 112-14).[4] The court entered a summary declaratory judgment adjudicating the Act constitutional (A. 114-40, 148-49). That court held, however, that the Act itself precluded the federal courts from exercising jurisdiction over any constitutional claims arising from the manner in which the Act was implemented or applied (A. 109-11). Accordingly, the district court dismissed petitioner's remaining constitutional claims with prejudice (A. 148-49).

The court of appeals vacated the district court's judgment (A. 145-46). That court held, sua sponte, that none of the claims directed at either the validity of the Act or the manner in which it had

4. Respondents did not appeal from that decision or argue that it was incorrect in the court of appeals.

been implemented and applied were ripe for adjudication (A. 4-5, 27-45). It remanded the case with instructions that these claims be dismissed without prejudice (A. 145-46). The present petition asks the Court to review that decision.

The Material Facts

The Act and Its Background

The Conference is composed of the Chief Justice and the chief judge and one district judge from each circuit. 28 U.S.C. § 331 (1982). Prior to the adoption of the Act, the Conference had adopted a Code of Judicial Conduct for United States Judges and had established an Advisory Committee on Judicial Activities to advise judges on extra-judicial activities and other conduct matters. Although the patterns varied, the councils, conferences, and offices of the chief judge in the several circuits had

also evolved into significant components of the judicial bureaucracy.

The Act expanded and formalized the already considerable powers of the Conference, the Chief Justice, and the judicial council and the chief judge of each circuit. The Act assigned the Conference final authority to review rules adopted and actions taken by the various circuit councils pursuant to the Act [Act § 4; § 331); authorized the Conference to establish and delegate its power to review circuit council actions to a standing committee (id.); and vested the sole power to appoint the members of that standing committee in the Chief Justice (id.). The Act required that the judges of each court of appeals reconstitute the judicial council for the circuit to add district judges as members [Act § 2(a); § 332(a)(1)]. Each reconstituted council

was authorized to adopt its own rules governing proceedings on complaints filed under the Act [Act § 3(a); § 372(c)(11)].

The specific powers assigned and the procedures established for their exercise against the individual judge are the central facts of this litigation. Under the Act, any person may file a complaint alleging that a circuit or district judge has engaged in "conduct prejudicial to the effective and expeditious administration of the business of the courts" within the judge's circuit [Act § 3(a); § 372(c)(1)]. The chief judge of the circuit has non-reviewable discretion to certify a complaint for investigation and to select and appoint the judges who will conduct the investigation [id.; § 372(c)(3), (c)(4), and (c)(10)].

The Act authorizes the special

committee so selected to conduct an investigation as extensive as the committee considers necessary and confers upon it the subpoena power [id.; § 372(c)(5) and (9)(A)]. Under the Act, the committee must file its report and recommendations with the circuit council [id.; § 372 (c)(5)]. Although the Act requires that the special committee afford the accused judge a hearing, the procedural and evidentiary rules for that hearing are largely unspecified [id.; § 372(c)(11)], and the accused judge has no right to have the scope or method of the investigative proceedings reviewed or limited prior to their completion [id.; § 372(c)(10)].

The Act empowers the circuit council to conduct further investigations or to vote without further action upon the sanction or sanctions to be imposed upon the judge against whom the complaint was

filed [Act § 3(a); § 372(c)(6)]. The Act does not specify any rights for the accused judge at this stage. It does not even require that he or she receive the report and recommendations of the special committee that investigated the complaint or be permitted to participate in any proceedings before the circuit council [id.; § 372(c)(5), (6)(C), and (II)(B)].

The Act authorizes the circuit council to offer the accused judge an unearned pension to induce him or her to accept retirement in order to avoid further harassment and expense and the prospect of public censure or an impeachment certification [id.; § 372(c)(6)(B)(iii)]. In the alternative, the council may publicly censure the judge or impose any other sanction that would not constitute a permanent removal from office

[id.; § 372(c)(6)(B)]. If the council determines, however, that the accused judge has engaged in conduct that might constitute grounds for impeachment, it must certify the record compiled and its determination to the Conference [id.; § 372(c)(7)(B)].

Under the Act, an aggrieved judge may not seek judicial review of any determinations made against him or her, and the Conference or its standing committee has discretion to deny the aggrieved judge any review at all [Act § 3(a); § 372(c)(10)]. If review is granted or the proceedings certified, the Conference or its standing committee may conduct further investigations into an accused judge's conduct and independently determine the sanctions to be imposed [id.; § 372(c)(6) and (8)].

The Act also authorizes the Conference to determine that an accused judge's

conduct may warrant impeachment and, upon such a determination, requires the Conference to transmit the record of its and the circuit council's proceedings to the House of Representatives with a certification that the Conference has determined that an impeachable offense may have been committed [id.; § 372(c)(8)]. The Act does not, however, specify any rights that the aggrieved judge shall have before the Conference or its standing committee [Act §§ 2(a), 3(a); §§ 331, 372(c)(8) and (c)(10)].

The Act vests power and discretion in the circuit councils and in the Conference, or its standing committee to determine whether any information shall be disclosed to the public and, if so, to determine the content of the disclosure [Act § 3(a); § 372(c)(14) and (c)(15)]. The Act vests power and discretion in the

chief judge of the circuit and in the Chief Justice, or the chairperson of the Conference's standing committee, to prohibit an accused judge from making any disclosures and thereby to deny the accused judge any right to disclose the complaint or to insist that proceedings against him be open to the public or that the records of those proceedings be disclosed to him or to the public [Act § 3(a); § 372(c)(14)].

The Act authorizes the payment from public funds of expenses incurred by a circuit council or special committee in investigating or disciplining an accused judge [Act § 5; § 604(h)(1)]. The Act makes no provisions, however, for payment of expenses incurred by an accused judge in asserting and protecting his or her rights as a United States judge or otherwise to protect the judge from the dimi-

nution of compensation that must result from such efforts.

These are the powers the Act assigned and the mechanisms and procedures it prescribed for their exercise that are relevant to a determination of the constitutional questions presented here. The manner in which the Act has been implemented and applied further illustrates the constitutional concerns and is material to the ripeness questions presented here.

Implementation of the Act

The Act became effective on October 1, 1981 (Act § 7). The Conference promptly created a Committee to Review Circuit Council Conduct and Disability Orders (the "Standing Committee") and delegated its powers to the Standing Committee. The Chief Justice appointed three senior judges as the members of the Standing Committee. The court of appeals for each

circuit reconstituted its council, and each adopted rules for proceedings under the Act. The composition of the councils and the rules adopted, however, differ significantly among the circuits.[5]

Each of the chief judges has exercised his assigned powers to pass upon complaints and appoint special committees to investigate complaints against judges serving in his circuit. Special committees have exercised their power to conduct investigations and recommend sanctions. At least two circuit councils have exercised their power to impose sanctions upon a federal judge. The Standing Committee

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5. The composition of the reconstituted councils is reported in Neisser, The New Federal Judicial Discipline Act: Some Questions Congress Didn't Answer, 65 Judicature 142 (1981). The rules adopted by each of the circuit councils are described, analyzed, and summarized in Burbank, Procedural Rulemaking Under the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, 131 U. Pa. L. Rev. 283 (1982).

has exercised its delegated power to consider and deny petitions for review.[6] The applications of these powers against United States District Judge Miles Lord and Alcee L. Hastings are merely the most highly publicized of the proceedings to date.

In less than three years, almost 400 complaints were filed under the Act. These complaints have named more than 570 Article III judges. More than 250 of those complaints were directed at conduct (as opposed to disability). The required statutory reports do not reflect the precise number of complaints that have been certified for investigation. The reports do disclose that some of these investigations have been completed and

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6. These facts are taken from the 1982, 1983, and 1984 Annual Report of the Director issued by the Administrative Office of the United States Courts.

that sanctions have been imposed. At least one judge has been induced to accept a "voluntary retirement" in exchange for an unearned pension to avoid further proceedings under the Act. As of June, 30, 1985, there were forty-six complaints still pending.

The Proceedings Against Judge Hastings

The Honorable Alcee L. Hastings is a United States District Judge in active service on the United States District Court for the Southern District of Florida. On December 29, 1981, attorneys for the executive branch filed an indictment that alleged that Judge Hastings had conspired to obtain a bribe in exchange for a specific judicial decision.[7] Judge

7. Judge Hastings promptly moved to dismiss the proceedings, claiming that the Constitution required that legislative impeachment and removal precede executive prosecution and judicial trial to chal-

Hastings was tried; he took the stand, testified, and was cross-examined. On February 4, 1983, the jury found him not guilty.[8] Judge Hastings promptly resumed the duties of his office.

Prior to Judge Hastings's acquittal the United States Court of Appeals for the Eleventh Circuit (the "Court of Appeals") reconstituted the Judicial Council for that circuit (the "Council") to include

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lenge a sitting federal judge's official acts. The designated district judge denied that motion, and Judge Hastings appealed. He requested that the judges of the court of appeals individually or en banc recuse or disqualify themselves from hearing the appeal, expressly calling to their attention the possibility of a conflict if subsequent proceedings were initiated against him under the Act. They refused, and that court affirmed the district court's decision. United States v. Hastings, 681 F.2d 706 (11th Cir. 1982).

8. Thereafter, this Court denied his petition seeking review of the court of appeals's pre-trial decision. Hastings v. United States, 459 U.S. 1203 (1983)(cert. denied).

all judges in active service on the Court of Appeals with the minimum complement of three district judges. The Council adopted its Rule for the Conduct of Complaint Proceedings under 28 U.S.C.A. § 372(c), A. 186-201.

On March 17, 1983, six weeks after Judge Hastings had been acquitted, two of the three district-judge members of the Council, the chief judges of the United States District Courts for the Middle District of Florida and for the Southern District of Georgia, filed a complaint (the "Complaint") that asked that Judge Hastings be recommended for impeachment or otherwise sanctioned pursuant to the Act. These chief judges alleged that Judge Hastings had committed the crimes of which he had been acquitted and based their allegations upon an opinion written by Circuit Judge Frank M. Johnson, Jr.,

that affirmed the conviction of the alleged co-conspirator. The Complaint also alleged that the defendant Hastings had violated the standards of conduct to be expected of Judge Hastings when he had alleged that the Justice Department's decision to prosecute him had been politically or racially motivated and when he asked that the designated judge disqualify himself and included among the grounds a claim that that judge's long standing relationship with the Chief Justice who had designated him to hear the case raised reasonable questions concerning his impartiality.

The complaint further alleged that Judge Hastings had improperly permitted his office to be used to solicit funds for his defense and that Judge Hastings's testimony in his defense at trial had revealed other violations of the canons in

the Code of Judicial Conduct that the Conference had approved. The Complaint asked that the Council "make such orders as shall be necessary to vindicate the Honor of United States Judges and to discipline the Respondent for his odious behavior including, but not limited to, the making of a recommendation to the House of Representatives that Respondent be impeached . . . ."

On March 29, 1983, Chief Judge Godbold selected Circuit Judge Johnson to serve as a member of the special committee (the "Investigating Committee") that he appointed to investigate the facts and allegations set forth in the Complaint. The Investigating Committee retained John Doar, a New York lawyer publicly known for his work in the Watergate impeachment investigation, as its investigator and later as its chief counsel. Chief Judge

Godbold then issued a widely-reported news release announcing that the Investigating Committee had been appointed to investigate a complaint against Judge Hastings and had retained Mr. Doar as its investigator. Thereafter, the Administrator of the United States Courts denied Judge Hastings's request that it undertake to pay the costs and attorney's fees necessary to enable him to defend himself against the allegations of misconduct in office.

The Investigating Committee promptly petitioned Judge Hastings's court for access to all the records of the grand jury that had returned the indictment against him.[9]

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9. The judges of that court again recused themselves, and Chief Judge Godbold delegated his designation decision to the senior judge of the Court of Appeals who in turn certified to the Chief Justice the necessity for designating a judge from

After six months of defending himself in that and related litigation, Judge Hastings filed the complaint that initiated the present case.

The Investigating Committee initiated its formal proceedings while the present case was pending before the court of appeals. On April 2, 1985, the Investigating Committee sent notice to Judge Hastings that it would hold formal hearings in Atlanta, Georgia, commencing May 20, 1985. It was not until May 9, 1985, however, that the Investigating Committee sent Judge Hastings notice specifying the procedures that it would employ in

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another circuit. The Chief Justice acted, the designated judge granted the petition, and Judge Hastings appealed. A certificate of necessity again issued, and the Chief Justice assigned judges from three different circuits to hear the appeal. They affirmed. See In re Petition to Copy and Inspect Grand Jury Materials, 576 F. Supp. 1275 (S.D. Fla. 1983), aff'd., 735 F.2d 1261 (11th Cir.), cert. denied, 105 S.Ct. 254 (1984).

those proceedings. In those notices the committee estimated that the presentation of its evidence would take at least ten days and advised Judge Hastings that the committee would not be bound by the rules of evidence. Neither notice gave any indication of the witnesses or other evidence the committee intended to present. The committee has since conducted three additional hearings pursuant to similar notices. Two were in Atlanta and one in Darlington, South Carolina. The hearings were held because the committee estimated it would need an additional seven days to present its own evidence.

In view of his constitutional challenge to the Act and the committee's proceedings, Judge Hastings filed a Special and Limited Appearance with the Investigating Committee reiterating his constitutional challenge to the commit-

tee's jurisdiction and advising it that he would not otherwise appear in the proceedings before it. He has not further appeared or participated.

The Investigating Committee has exercised its subpoena power extensively. Among those subpoenaed to appear during the first two-week set of hearings were Judge Hastings's secretary, one of his then and five of his former law clerks, and two of the lawyers who had represented him in the prior criminal proceedings. Judge Hastings's trial counsel, another of his former attorneys, and an investigator whom they had retained to assist them in preparing for his defense were among those subpoenaed to appear at the second Atlanta session. Throughout, the Investigating Committee has utilized the services of the Federal Bureau of Investigation to aid it in its investigations and to serve

its subpoenas.

Although much of the Investigating Committee's activity remains shrouded under the Act's cloak of secrecy, it is clear that the investigation now extends well beyond the allegations in any complaints filed against Judge Hastings. For example, it has sought and obtained records from Judge Hastings's banks spanning the period 1980 through 1985. It has also required the former mother-in-law to Judge Hastings's trial counsel and confidant to appear and testify even though she had informed its investigators that she had never met Judge Hastings.

The Investigating Committee's actions have removed the doubts that apparently troubled the court of appeals concerning the effect of the proceedings on Judge Hastings and the court on which he serves. Judge Hastings carries a full caseload on

the district court that has the heaviest docket in the nation. The bulk of his and his colleagues' time must be devoted to hearing serious criminal cases subject to the strictures of the Speedy Trial Act, 28 U.S.C. §§ 3161-74 (1982). To exercise the limited confrontational rights the committee thought his due, Judge Hastings would have had to set aside his docket and his other duties as a judge on that court for at least the 17 days of hearings that the committee has held thus far, apparently without even completing the presentation of its own case. Using the government's per diem allowances and published air tariffs, Judge Hastings would have had to expend almost $10,000 simply for transportation, room, and board for himself and two attorneys. He and those lawyers would have had to prepare for those hearings without prior knowledge of what witnesses

the committee intended to call, what documents it would use, or what rules of evidence it would apply. The financial and reputational burdens on Judge Hastings and the disruption to his docket and that of his court could be developed at length; in fact, they are irreparable because they are incalculable.

The Investigating Committee's actions have given rise to further litigation for which the Chief Justice has had to select the judges from outside the Eleventh Circuit who will preside and decide the issues raised. Judge Hastings, his secretary, and one of his then law clerks filed suit challenging the Investigating Committee's power to compel testimony from his present and former chambers staff. Williams v. Mercer, No. 85-1772-Civ. (S.D. Fla. filed May 20, 1985). Thereafter, the Investigating Committee filed seriatim

motions asking the Court of Appeals to exercise original jurisdiction to compel the appearance or testimony of the secretary and those of the law clerks and attorneys who objected and asserted judicial or attorney-client privilege as a ground for declining to appear or to answer its questions. Motions docketed sub nom., In the Matter of Complaints Filed Against United States District Judge Alcee L. Hastings, No. 85-2054 (11 Cir.).

The judge designated by the Chief Justice to hear the district court suit ruled that the Court of Appeals had exclusive jurisdiction and promptly dismissed the action for want of subject-matter jurisdiction. Williams v. Mercer (order entered May 24, 1985), appeal pending, No. 85-5420 (11 Cir.). The judges specially designated by the Chief Justice to hear the Investigating Com-

mittee's motions and the appeal ordered expedited briefing and heard argument in both cases on June 13, 1985. On September 5, the special panel issued an order requiring supplemental briefing in light of the decision of the court of appeals in this case. Both cases are now pending before the special panel.

REASONS WHY REVIEW SHOULD BE GRANTED

The substantive questions concerning the validity of the Act are fundamental. Their importance is apparent. They can only be resolved by this Court. The questions arising from the manner in which the Act has been applied against Judge Hastings are also fundamental. Their importance stems from and has been enhanced by the failure of any of the lower courts to consider the merits of those claims over the past three years. That failure has created legitimate concerns

about the ability to the judiciary to treat fairly when members of its establishment challenge a disfavored judge.

Moreover, the decision below will have an unintended consequence. It will interfere with and may preclude a proper adjudication of the issues concerning the Act's validity. Those are the factors that make it necessary that this Court grant review in this case. They are developed briefly below.

1. The court of appeals's application of the ripeness doctrine to avoid the constitutional questions in this case enhances the need for review by this Court. The questions concerning the facial constitutionality of the Act are among the most important that will ever come before this Court. Congress recognized that it was prescribing fundamental changes that were intended to alter the

operation of the federal court system and to limit the independence of the individual judge when it adopted the Act. None of the judicial officers and agencies who are parties here has ever suggested that the changes prescribed or the issues presented are less than fundamental. The opinion below acknowledged as much and the concurring opinion articulated the fundamental importance of those issues more eloquently than counsel for petitioner could here. These are issues that can only be resolved by this Court. They fully merit its consideration. In that light, the real issue presented by the petition is not whether the underlying questions will have to be resolved by this Court; rather it is whether the Court should grant review to provide the necessary resolution in this case.

The manner in which the Act has been

and is being implemented and applied in the proceedings against Judge Hastings also poses questions that are crucial. The basic question is apparent: Does the Constitution impose any enforceable checks upon the manner in which administrative officers and agencies of the judicial branch may exercise the powers assigned them by the Act against the individual judge? Throughout the litigation involving Judge Hastings, there has also been an equally important but less apparent issue. Any fair view of the decisions and opinions in Hastings cases raises the tacit question: Will the courts enforce the Constitution to provide any meaningful protection for an individual judge who has fallen into disfavor with those of his judicial colleagues who hold the powers of the judicial establishment?

The concurring opinion below noted

this concern and articulated its importance:

> In our haste to assail Judge Hastings outside of the constitutionally prescribed impeachment process, we seemingly have lost sight of Hamilton's words. In our zeal for efficiency and moral purity in the judicial ranks, we may be indulging a cavalier assumption that the independence of the judiciary will not suffer from "minor" legislative encroachments. Our self-righteous finger-pointing at Judge Hastings may blind us to the reality that this case has more to do with the potential diminution of the independence of the judiciary than with the alleged misconduct of an individual judge. If Judge Hastings can be made to answer, outside of the criminal and impeachment processes, for judicially-related activities, pursuant to a loosely constructed congressional act regulating judicial "misconduct," one wonders about the sanctity of separation of powers and the inviolability of judicial independence.

A. 52-53.

Against this background petitioner

submits that the decision of the court of appeals is likely to have two consequences that enhance the need for review by this Court in this case. First, the effect of the panel decision will be to transfer the underlying issues directly presented in this case to another court in which they are not directly presented and are likely to be lost amidst a morass of collateral issues concerning the original jurisdiction of the courts of appeals and the standing of Judge Hastings's law clerks and former lawyers to raise these issues in subpoena enforcement proceedings. If the issues are not lost, they are likely to be fragmented and decided upon a hastily assembled record that can only frustrate proper adjudication and review. See infra at 40-46.

Second, the sua sponte application of the ripeness doctrine by the court of

appeals and its unintended effect can only reinforce the concern that judicial self-righteousness and "zeal for efficiency and moral purity" have again made the Hastings cases the kind of "hard cases" that make "bad law". The absence of briefing and argument led the panel to apply the ripeness doctrine in a manner that conflicts with every recent application of that doctrine by this Court and with the policies requiring prompt adjudication of constitutional issues such as those presented here that those decisions here intended to establish and promote. See infra at 46-58. The decision below must thus further reinforce the concern that the courts are evading, rather than avoiding, these issues until Judge Hastings has been dealt with.

The presence of that concern enhances the need for this Court to grant review so

that it may consider the ripeness questions in light of the concerns and the potential consequences of the decision below. The potential consequences enhance the need for prompt review so that the Court may properly consider and resolve the substantive constitutional questions before they are lost or fragmented.

2. The decision below is likely to preclude a full and proper adjudication of the constitutionality of the Act. Judge Hastings filed his complaint in the only court in which all parties necessary and proper to a full adjudication of his claims could be joined in a single action and in which the issues could be decided by judges who had not been specially designated for the task by one of the proper parties-defendant. Respondents tacitly acknowledged the need for such a forum by waiving any objections to in

personam jurisdiction or venue. The district court, with ironic foresight, declined to apply the ripeness doctrine in part because "Principles of judicial economy also counsel against piecemeal adjudication of Judge Hastings's broad complaint, directed as it is to all aspects of the Act." A. 114.

If review is not granted, the decision below will have the unintended consequence of converting what ought to have been an orderly adjudication of fundamental claims in a proper forum into a potential inter-circuit shell-game in which the victim must guess under which procedural shell the constitutional pea is hidden at peril of losing his right to have the merits decided at all should he guess wrong. Moreover, it will not only disrupt the judicial economy, it will also dramatically enhance the economic burdens

imposed upon the only United States judge and party whose costs and fees in these and all related proceedings are not being borne by the federal treasury.

On September 5, 1985, the special panel designated to sit as the Court of Appeals to decide In the Matter of Complaints and Williams v. Mercer requested supplemental briefing in light of the decision below. In response, Judge Hastings filed a motion for limited intervention solely for purposes of asserting the judicial and attorney-client privileges. By that motion, he sought to remove any questions concerning his former clerks' and attorneys' standing to object to the enforcement of the subpoenas. That motion was denied. The Justice Department filed a motion to intervene in support of the Act. That motion was granted.

Based upon the briefing now before

it, the special panel court must now determine:

1. Did the Act grant the courts of appeals original jurisdiction to enforce committee and council subpoenas and implicitly deprive the district courts of subject-matter jurisdiction over related claims arising under the Constitution and laws of the United States?

2. If so, did Congress also intend to grant the courts of appeals nationwide in personam jurisdiction without regard to where the subpoenaed person was served or resides? [9]

3. If so, does the Due Process clause permit the Act to be construed as a grant of nationwide jurisdiction and venue

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9. See, e.g., United States v. Hill, 694 F.2d 258 (D.C. Cir. 1982)(for an analysis of the kinds of issues the special panel must address and resolve).

to each court of appeals? [10]

4. If so, do a federal judge's law clerks or lawyers have standing to assert a judicial or the attorney-client privileges.

5. If so, are conversations between a federal judge and his or her law clerks privilege?

6. If so, have the privileges that protect Judge Hastings's communications with his lawyers or with his law clerks been waived and, if so, to what extent?

7. If these privileges have not been fully waived, does the Act override or limit either of those privileges and, if so, to what extent?

8. To the extent that these privileges have not been abrogated by

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10. See Fullerton, Constitutional Limits on Nationwide Personal Jurisdiction in the Federal Courts, 79 Nw. U.L. Rev. 1 (1984) (and authorities collected therein)(for a recent analysis of the issue).

the Act, do a judge's law clerks or former lawyers have standing to raise any constitutional issues concerning the validity or application of the Act in subpoena enforcement proceedings? [11]

9. If so, which specific constitutional issues would have to be decided before the subpoenas could be enforced?

10. Which of those specific issues are ripe for adjudication on the limited record before the special panel?

11. How should those specific constitutional issues be resolved?

If this court does not grant review here, after the special panel decides the

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11. See, e.g., FAIC Securities, Inc. v. United States, 768 F.2d 352 (C.C. Cir. 1985)(for an analysis of the kinds of issues the special panel must address and resolve).

cases before it, either this Court or the district court below will then have to confront the collateral effect of that decision upon the claims that were properly and initially asserted here and, widen the decision below, must now be asserted again.

The scenario portrayed is real; it is not consistent with sound judicial policy; and it is not fair -- to petitioner, to the courts and the judges who serve on them, or to the Constitution. This Court should grant review to avoid the unnecessary and disruptive consequences that will otherwise be caused by the decision below.

3. The decision below conflicts with established precedent and policy controlling the application of ripeness doctrine. It is clear that the ripeness doctrine did not compel the result reached by the court

of appeals. In the district court, Judge Hastings sought a declaratory judgment that the fully implemented Act could not withstand a facial comparison with the Constitution as it had been implemented and applied. This Court's "pre-enforcement" decision clearly indicate that the issues raised by that claim became ripe and fell within the class of issues that warrant prompt adjudication as soon as the Act had become effective and had been implemented. The fact that the Act had been applied against Judge Hastings was material to that claim only because it eliminated any questions concerning the plaintiff's standing and the adversity of the interests he asserted against the defendants.

The Court has articulated and consistently applied a two-prong test in determining ripeness questions. "The

problem is best seen in a twofold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of witholding court consideration." Abbott Laboratories v. Gardner, 387 U.S. 136, 148-49 (1967).

Applying that test, the Court has consistently held that interests less substantial than the Nation's interest in avoiding the imposition of unconstitutional burdens on its federal judges were sufficient to require prompt adjudication of facial challenges to statutory and regulatory provisions whose meaning and application were far less certain than the provisions challenged here. The regulatory burdens that would be imposed upon "reputation sensitive" drug manufacturers required prompt adjudication of the facial validity of the challenged regulations in Abbott Laboratories, 387 U.S. at 148-53.

The interests of railroad creditors and shareholders required early adjudication of the constitutionality of the statutory blueprint for the reorganization of several of the Nation's railroads in the Regional Rail Reorganization Act Cases, 419 U.S. 102, 122-25 (1974), notwithstanding the absence of a record that might have made it possible to avoid some of those issues and the presence of statutorily prescribed procedures assuring prompt post-application judicial review, id. The interests of political candidates and their supporters required prompt adjudication of the constitutionality of the amended federal election campaign laws in Buckley v. Valeo, 424 U.S. 1, 113-18 (1976), even though the election commission had yet to take any enforcement action, id. The interests of environmentalists and the nuclear industry were

sufficient to require prompt adjudication of the constitutionality of statutory limits on nuclear liability in Duke Power Company v. Carolina Environmental Study Group, 438 U.S. 59, 81-82 (1978), even though the Court deemed remote the probability that injury subject to those limits would ever occur, id. See also 4 Davis, Administrative Law Treatise, § 25:8 (2d ed. 1983).

This case was neither a pre-implementation nor a pre-enforcement challenge. The principal claims asserted are fixed and subject to no contingencies: neither petitioner nor the respondents can amend the Act or the Constitution. The Nation's interests in protecting the independence of its federal courts is at least as great as its interests in protecting the financial stability of its railroads, of its political campaigns, and of its nuclear

industry. The decision below conflicts with this Court's precedents and with the policies they establish.

The decision below also seems inconsistent with this Court's recognition that ". . . our Constitution . . . commands that the independence of the Judiciary be jealously guarded, and it provides clear institutional protections for that independence." Northern Pipeline Construction Co. v. Marathon Pipe Line Company, 458 U.S. 50, 60 (1982). The decision also seems inconsistent with the Court's application of the command and the protections to invalidate provisions of the Bankruptcy Reform Act on the ground the bankruptcy judges subject to circuit council regulation during their fixed terms as well as to federal statutes governing the salary of all federal civil servants lacked the constitutionally

mandated independence necessary to adjudicate common law contract claims. Id. at 59 n.10, 60-61; see also id. at 89-90 (Rehnquist, J. concurring).

The decision that petitioner must further endure the burdens of the Investigating Committee's proceedings similarly conflicts with established precedent and policy. See, e.g., Public Utilities Commission of California v. United States, 355 U.S. 534, 539-40 (1958) (claims ripe where the only question is whether it is constitutional to fasten administrative proceeding onto litigant and judicial intervention is the only effective way of protecting the constitutional right involved); cf. United Public Workers v. Mitchell, 330 U.S. 75, 91-94 (1948) (constitutional challenges to Hatch Act asserted by the one civil servant against

whom administrative proceedings had been initiated were ripe required prompt adjudication). Indeed, the only two courts of appeals to consider the issue have recognized that a federal administrative proceedings had been initiated were ripe and required prompt adjudication). Indeed, the only two courts of appeals to consider the issue have recognized that a federal judge's claim that the Constitution guarantees him the right not to be subject to a proceeding is a right that "would be wholly deprived of meaning" if he were forced to undergo the proceedings before he could assert it. United States v. Hastings, 681 F.2d 706, 708-09 (11th Cir. 1982), cert. denied, 459 U.S. 1203 (1983); United States v. Claiborne, 727 F.2d 842, 844 (9th Cir.), cert. denied, 105 S.Ct. 113 (1984).

The court of appeals misperceived the

nature of the claims asserted and conflated concepts of ripeness, administrative exhaustion, and judicial deference in reaching its conclusions. The claims directed at facial validity were not dependent upon contingent outcomes or possible sanctions: They sought declatory judgment that the assignment the investigative and appointment powers made by the Act and the specific combinations of the assigned legislative, executive, and adjudicative powers that the Act prescribed conflicted with the constitutional allocation of those powers. Cf. Steffel v. Thompson, 415 U.S. 452 (1974). The threat of a Sword of Damocles is that it hangs; the threat of the Act is that it exists.

Similarly, the claims directed at the manner in which the Act had been implemented and applied were largely indepen-

dent of outcomes and possible sanctions. The central claims alleged that an improperly constituted and impermissibly biased tribunal was conducting an impermissibly broad and unfair investigation that was causing irreparable financial and reputational injury to a United States judge. The nature of that injury was and remains apparent. Judges are engaged in a reputation sensitive injury. Chief Judge Godbold's unilateral news release, the litigation initiated by the Investigating Committee, the service of subpoenas on the judge's clerks, lawyers, friends, banks, and other members of his community constitutes on-going injury. The lower court's conclusion that petitioner had not and could not show irreparable injury is belied by the concurring opinion's acknowledgment of the apparent financial burdens the proceedings have imposed.

The Supplemental Appendix filed in that court made it clear that the Investigating Committee is proceeding in cavalier disregard of the fact that Judge Hastings is a judge in active service on the district court with the heaviest docket in the nation. The injury is not only to Judge Hastings, but also to that court and the litigants who appear before it.

Nonetheless, the court correctly noted that certain of petitioner's claims might be clarified and made more concrete by the Investigating Committee's actions. The events that occurred while the appeal was pending have provided that clarification and should now be considered. See, e.g., Buckley v. Valeo, 424 U.S. at 114-17. For example, the district court upheld the facial validity of the Act in the face of plaintiff's due process claims

by finding certain rights implicit in the Act. A. 136-37. The procedure the Investigating Committee prescribed for its hearings, its use of seriatim hearings, the ever-expanding scope of its investigation and its use of executive agents, the use of the subpoena power to override all claims of privilege and to probe areas of Judge Hastings's personal background with no apparent relevance to his conduct in office, and the failure to consider the demands of his office do not demonstrate the "sensitivity to the procedural rights of judges under inquiry" that the district court found implicit in the Act. Id. at A. 139.

The fact that the Investigating Committee exercised its powers while the appeal was pending in a manner that rejected the construction that the district court below thought necessary

to uphold the Act's facial validity bears upon the constitutionality of the manner in which the Act is being applied. The ripeness of the claims stemming from that application should now be considered on a record that reflects these events.

CONCLUSION

Petitioner is a United States judge. That was a decision made by a prior President with the consent of a prior Senate. In theory, petitioner's compensation may not be diminished while he remains a judge, and, in theory, he will remain a judge unless and until he is impeached and removed from office by action of the two houses of Congress. In reality, petitioner's compensation has been substantially diminished, and his ability to function as a judge has been significantly undermined for the past four years.

It may be that the Court will decide that the Act is necessary and proper, but those questions are fairly debatable. See, e.g., Note, Unnecessary and Improper: The Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, 94 Yale L.J. 1117 (1985). It may be that the Court will decide that the manner in which the Act has been applied against petitioner is proper. But that too raises fairly debatable questions.

Petitioner submits, however, that need for prompt and final resolution of these questions is not fairly debatable. Neither the holders nor the objects of the powers assigned by the Act should have to function in an arena of constitutional uncertainty, and nor should Congress. Only this Court can provide the necessary resolution. Petitioner submits it should do so in this case. Accordingly, he asks

that the petition be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

THE HONORABLE ALCEE L. HASTINGS,
UNITED STATES DISTRICT JUDGE,
Petitioner,

v.

THE JUDICIAL CONFERENCE OF THE UNITED STATES, *et al.*,
Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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JANUARY 30, 1986

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 84-5576

The Honorable ALCEE L. HASTINGS,
U.S. District Judge, APPELLANT

v.

JUDICIAL CONFERENCE
OF THE UNITED STATES, et al.

Appeal from the United States District
Court for the District of Columbia

(Civil Action No. 83-03850)

Argued April 12, 1985
Decided August 13, 1985

Terence J. Anderson, with whom John W. Karr and Robert S. Catz were on the brief, for appellant.

Brook Hedge and John Doar for appellees, Department of Justice, et al. Richard K. Willard, Joseph E. diGenova,

Sandra M. Schraibman and Harold J. Krent, entered appearances for appellee, Department of Justice.

Daniel J. Popeo and George C. Smith were on the brief for the Washington Legal Foundation, amicus curiae, urging affirmance.

Before EDWARDS and BORK, Circuit Judges, and McGOWAN, Senior Circuit Judge.

Opinion for the Court filed by Senior Circuit Judge McGOWAN. Opinion concurring in part filed by Circuit Judge EDWARDS.

Appellant, United States District Judge Alcee L. Hastings, seeks reversal of a judgment by the District Court dismissing his suit to enjoin the continuation of an investigation of his judicial conduct by an investigative committee of the Judicial Council of the Eleventh Circuit. The investigation was initiated pursuant to the Judicial Councils Reform

and Judicial Conduct and Disability Act of 1980, 28 U.S.C. §§ 331, 332, 372(c), 604 (1982) [hereinafter, "the Act"]. Appellees are the Judicial Conference of the United States; the Chief Justice of the United States, in his capacity as presiding officer of the Conference; the Standing Committee of the Judicial Conference; the Judicial Council of the Eleventh Circuit; the Chief Judge of the Eleventh Circuit; the member-judges of the Investigating Committee; and the Attorney General of the United States.

Appellant's complaint contains four counts. The first alleges that the Act is unconstitutional on separation-of-powers and due process grounds. Count Two asserts that the application of the Act to appellant violates the same constitutional principles. Count Three alleges that the Committee's investigation of Judge

Hastings is the result of a conspiracy among judges of the Eleventh Circuit to violate Hastings' constitutional rights. The final count claims that appellant's rights under the Privacy Act of 1974, 5 U.S.C. § 552a (1982), have been violated in connection with the investigation. On cross-motions for summary judgment, the District Court rejected the challenge in Count One to the facial validity of the Act. The Court dismissed Counts Two and Three as unreviewable under the explicit terms of the Act. Finally, the Court dismissed the Privacy Act count for failure to state a cognizable claim.

For the reasons hereinafter appearing, we hold that, at the time the District Court rendered its decision, adjudication of Counts One and Two was premature. We therefore vacate the District Court's grant of summary judgment

to appellees on Count One and affirm the District Court's dismissal of Count Two. We also affirm the District Court's dismissal of Counts Three and Four, although, as with Count Two, our reasons for holding these counts properly dismissed differ from those offered by the District Court.

I

The Act established a formal mechanism by which federal judges could be disciplined by fellow judges for "conduct prejudicial to the effective and expeditious administration of the business of the courts." 28 U.S.C. § 372(c)(1). "Any person" alleging such conduct on the part of a judge may set that mechanism in motion by filing with the clerk of the circuit in which the judge sits a complaint containing a "brief statement of the facts constituting such conduct." Id.

The clerk of the court must then transmit the complaint to the chief judge of the circuit (or to the next most senior active service judge of that circuit, if the chief judge is the subject of the complaint), as well as to the judge who has been named in the complaint. The chief judge, after "expeditiously reviewing a complaint," id. § 372(c)(3), may take any of several courses of action. He may dismiss the complaint if it either (1) fails to conform with the requirements for a complaint stated above, or (2) directly relates to the merits of a decision or procedural ruling, or (3) is frivolous. Id. § 372(c)(3)(A). The chief judge may also conclude the proceeding if he finds that "appropriate corrective action has been taken." Id. § 372(c)(3)(B).

If the chief judge neither dismisses the complaint nor concludes the action, he must appoint a special committee, consisting of himself plus equal members of circuit and district judges of the circuit, to investigate the facts and allegations contained in the complaint. Id . § 372(c)(4). The Act grants the committee the power to conduct an investigation "as extensive as it considers necessary." Id. §372(c)(5).

When the committee has completed its investigation, it is required to file with the judicial council of the circuit[1] "a

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1. The judicial council of each circuit is presided over by the chief judge of the circuit and consists, in addition, of a certain number of circuit and district judges of that circuit, the number to be fixed by a majority vote of the active circuit judges of that circuit in accordance with 28 U.S.C. § 332(a) (1982).

comprehensive written report . . . present[ing] both the findings of the investigation and the committee's recommendations for necessary and appropriate action by the judicial council of the circuit." Id. § 372(a)(5). Upon receiving the committee's report, the circuit judicial council may conduct any additional investigation it considers necessary. In addition, the judicial council "shall take such action as is appropriate to assure the effective and expeditious administration of the business of the courts within the circuit." Id. § 372(a)(6)(B). Such action may include requesting that the judge voluntarily retire; ordering that, "on a temporary basis for a time certain," no further cases be assigned to the judge; and public or private censuring of the judge. Id.

Rather than take such action itself, however, the judicial council has the option of referring a complaint, along with the record of any proceedings undertaken to that point and the council's recommendations for appropriate action, to the Judicial Conference of the United States. Id. § 372(c)(7)(A).[2] The Act also requires transfer to the Judicial Conference of any case in which the circuit judicial council determines, on the basis of a complaint and an investigation under this subsection, or on the basis of "information otherwise available to the council," id. § 372(c)(7)(B), that a judge has engaged in conduct that either

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2. The Judicial Conference is composed of the chief judges of all the circuits plus a designated district judge from each circuit, and is presided over by the Chief Justice of the United States. See 28 U.S.C. § 331 (1982).

(1) might constitute one or more grounds for impeachment under Article I of the Constitution, or (2) "in the interest of justice, is not amenable to resolution by the judicial council." Id.

Having had proceedings transferred to it from a circuit judicial council via either of the above paths, the Judicial Conference, "after consideration of the prior proceedings and such additional investigation as it considers appropriate," id. § 372(c)(8), shall by majority vote, take any of the courses of action, described above, that were open to the judicial council. In addition, if the Conference determines--either on its own or upon review of the judicial council's determination--that consideration of impeachment may be warranted, it shall transmit its determination to the United

States House of Representatives "for whatever action the House of Representatives considers to be necessary." Id.

In any investigation undertaken pursuant to the Act, the investigating body, be it the special committee, the circuit judicial council, or the Conference, is vested with full subpoena powers. Id. § 372(c)(9)(A), (B); see id. §§ 331, 332(d). The Act also gives each such body the power to prescribe rules for the conduct of its proceedings, although such rules must provide certain minimum procedural safeguards.[3]

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3. Such rules shall contain provisions requiring that--

(A) adequate prior notice of any investigation be given in writing to the judge or magistrate whose conduct is the subject of the complaint;

(B) the judge or magistrate whose conduct is the subject of the the complaint be afforded an opportunity to appear (in person or by counsel) at proceedings conducted by the investigating panel, to present oral and documentary evidence, to compel the attendance of

The Act expressly limits the availability of review of orders and determinations made under the Act. See 5 U.S.C. § 372(c)(10). A petition for review may be filed with the circuit judicial council by a complainant or judge aggrieved by an order of the chief judge, pursuant to § 372(c)(3), dismissing a complaint or concluding a proceeding, see infra pp. 3-4. An aggrieved complainant or judge may also petition the Judicial Conference for review of action taken by the judicial council pursuant to § 372(c)(6). With

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3. (Continued)
witnesses or the production of documents, to cross-examine witnesses, and to present argument orally or in writing; and

(C) the complainant be afforded an opportunity to appear at proceedings conducted by the investigating panel, if the panel concludes that the complainant could offer substantial information.

228 U.S. § 372(c)(11) (1982).

these two exceptions, "all orders and determinations, including denials of petitions for review, shall be final and conclusive and shall not be judicially reviewable on appeal or otherwise." Id. at § 372(c)(10).

II

As a description of the proceedings so far will reveal, little of the Act has as yet come into play. On December 29, 1981, a federal grand jury indicted appellant, a district judge in the Southern District of Florida since 1979. The indictment charged appellant with conspiracy to solicit and accept money in return for being influenced in his performance of official acts as a United States district judge. The indictment further alleged that appellant had informed his co-conspirator, one William Borders, of the substance and date of

issue of a forthcoming judicial order and that Borders had in turn passed the information on to a person he believed to be a defendant in the case involved.

After an unsuccessful motion to quash the indictment on the ground that the sole means of punishing a judge for high crimes and misdemeanors is impeachment by Congress, appellant was brought to trial. His co-conspirator had already been convicted of the conspiracy counts in a separate trial, and his conviction had been upheld against an attack on sufficiency grounds in an opinion that detailed the evidence against appellant as well as Borders. Appellant's trial, however, ended in acquittal.

On March 17, 1983, two federal district judges filed with the Eleventh Circuit a complaint under § 372 of the Act, charging that appellant had engaged

in conduct prejudicial to the effective and expeditious administration of the business of the courts and had violated several Canons of the Code of Judicial Conduct for United States Judges. The specific allegations referred both to the conduct on which the indictment rested and to other conduct and statements by appellant occurring in the course of the criminal proceedings against him.[4]

4. The complaining judges alleged that:

(1) Judge Hastings had conspired with Borders to obtain a bribe in return for an official judicial act;

(2) Judge Hastings made "public and unfounded statements" that the United States was prosecuting him on racial/political grounds;

(3) Judge Hastings knowingly and publicly exploited his judicial position or acquiesced in such exploitation by others acting on his behalf by accepting financial donations from lawyers and other members of the public to defray the costs of his criminal defense;

(4) Judge Hastings, by his own testimony, had allowed ex parte contacts between his law clerk and counsel in pending cases concerning substantive issues in those cases and concerning the content of orders and opinions not yet

On March 29, 1983, the Honorable John C. Godbold, Chief Judge of the Eleventh Circuit, appointed an investigative committee consisting of himself, two federal circuit judges, and two federal district judges. The Committee in turn appointed a private attorney as its counsel.

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4. (Continued)

entered, and had "completely abdicated and delegated" his judicial decision-making authority to his law clerk;

(5) Judge Hastings, by his own testimony, had told counsel in a judicial proceeding that he had read an important precedent when he knew he had not and explained his deception by implying that it was common for judges to make such deliberate misstatements;

(6) Judge Hastings, by his own testimony, had exploited his judicial position by soliciting funds for someone he knew was a convicted federal offender.

Hastings v. Judicial Conference of the United States, 593 F. Supp. 1371, 1376-77 (1984).

The Committee began its investigations on June 3, 1983, with the filing of a petition in the Southern District of Florida for access to the materials of the grand jury that had indicted appellant and his co-conspirator. The petition was granted over appellant's objections, and the order granting the petition was affirmed by a panel of the Eleventh Circuit. In re Petition to Inspect and Copy Grand Jury Materials, 735 F.2d 1261 (11th Cir.), cert. denied, 105 S.Ct. 254 (1984).[5]

Approximately six months after the investigation began, appellant filed this action in the United States District Court for the District of Columbia, seeking a

5. The panel was actually composed of three specially designated circuit judges from other circuits, as all of the Eleventh Circuit Judges had recused themselves from the appeal. See In re Petition, supra, at 1265 n.3.

declaration that the Act is void and an injunction against continuation of the proceedings taken against him pursuant to the Act. As stated earlier, his complaint contains four counts. The first count challenges the facial constitutionality of the Act on separation-of-powers and due process grounds. The second count attacks the constitutionality of the Act as applied to Judge Hastings. Count Three alleges that the complaint filed against Judge Hastings under § 372(c)(1) of the Act, and the proceedings thereafter initiated, are the product of a conspiracy to violate his constitutional rights. The fourth count alleges a violation of appellant's rights under the Privacy Act, 5 U.S.C. § 552a (1982).

As of the date of the District Court's decision in this case, the Investigative Committee was still at work.

No report had issued from the Committee with recommendations for disposition of the complaint.

III

In the District Court, appellant had set forth three grounds for his Count One allegation that the Act is facially unconstitutional, each of which grounds were rejected by the Court. First, appellant argued that Congress lacks the power to provide the judiciary with the means to discipline Article III judges. Under the separation-of-powers doctrine, Congress alone, through the impeachment power, may discipline judges for misconduct in office. The Act's provisions, appellant contended, represent an unlawful delegation of Congressional authority to a branch -- the judiciary -- constitutionally incapable of disciplining itself.

The District Court held that the Act does not violate the separation-of-powers doctrine because it is precisely "in order to assure the integrity and independence of the judicial branch" that these, and earlier, limitations have been placed on the independence of any individual federal judge. 593 F. Supp. at 1379. The Court stated: "The independence of the judiciary depends both on the courage and integrity of individual judges and on the public perception of the institution as fair, impartial and efficient. The judiciary has the inherent power to govern itself in a manner that will achieve these ends." Id. at 1380. The Act, the Court concluded, "represents a legitimate exercise of Congress's 'necessary and proper' power to effectuate that judicial power." Id. Rather than intrude upon judicial independence, Congress "was simply recognizing

the need to give the courts reasonable means to put the judiciary's own house in order." Id. The court also held that the impeachment provisions of Article II neither preclude the Judicial Conference from recommending to the House that particular judges be impeached nor preempts the judicial councils or the Judicial Conference from invoking the various disciplinary measures open to them under the Act.

Appellant also argued that the Act's standards of misconduct are constitutionally vague and overbroad and impermissibly chill his and all other federal judges' constitutionally guaranteed judicial independence. The District Court disagreed. According to the court, the standard set forth in § 372(c)(7)(B)(i)--i.e., "conduct which might constitute one or more grounds for impeachment" --gave

clear notice to Judge Hastings that his alleged conduct was proscribed. With respect to the alleged bribe and obstruction of justice, the Court stated that "[i]t is difficult to imagine any conduct by a judge, if it occurred, more worthy of impeachment," 593 F. Supp. at 1382, and that "'[o]ne to whose conduct a statute clearly applies may not successfully challenge it for vagueness.'" Id. (quoting Parker v. Levy, 417 U.S. 733, 756 (1974)). As to the standard set forth in § 372(c)(1)--i.e., "conduct prejudicial to the effective and expeditious administration of the business of the courts"--the court noted that it was "necessarily broad" and, when read in the light shed by its legislative history, was not vague. 593 F. Supp. at 1382.

Finally, appellant asserted that the procedures authorized by the Act violate his fifth amendment rights to due process of law. Specifically, he contended that the Act (1) prevents him from confronting the evidence against him, and (2) impermissibly combines investigative and adjudicatory powers, so as to render impossible a fair adjudication. The court found no merit to either of Judge Hastings' due process claims. The court read the Act to require a judge under inquiry to have the right to confront all the evidence against him, although not to give the judge the right "to re-confront old evidence at every stage where it is considered." Id. at 1383. As to the combination of investigative and adjudicatory functions, the court held that not to constitute a due process violation in itself, id. at 1384 (citing Withrow v.

Larkin, 421 U.S. 35, 58 (1975), and found Judge Hastings to have failed to make the requisite showing of unfair risk in this instance.

As to Count Two, the challenge to the constitutionality of the Act as applied to appellant, and Count Three, the conspiracy claim, the District Court held that adjudication was barred by § 372(c)(10) of the Act, which precludes judicial review of "orders and determinations" made with respect to individual judges. Regarding Count Two, the Court stated:

> While there is always a basic presumption of judicial review and a Congressional intent to preclude review must be explicit, the language of the Act and its legislative history plainly show that Congress intended to establish an absolute bar against judges under inquiry seeking judicial review of actions taken against them pursuant to the Act. Congress's power to preclude such judicial review is well established. Accordingly, this Court must conclude it has no jurisdiction over Judge Hastings' Count Two

> claims concerning the present and possible future application of the Act to him.

593 F. Supp. at 1377-78 (citations and footnotes omitted). The same reasoning applies, the Court held, to review of the Chief Judge's order to initiate that investigation, "even if Judge Hastings seeks to clothe his request for review in the language of conspiracy." 593 F. Supp. at 1384.

Addressing Count Four, the Privacy Act claim, the District Court simply found no violation of the relevant statutory provisions:

> Count Four states on its face no Privacy Act claim in regard to past actions by the Justice Department, since the Act requires neither that Judge Hastings be notified nor approve of any disclosures made. See 5 U.S.C. § 552a(b)(7), (e)(8). The Justice Department memorandum mentioned in paragraph 57 of the amended complaint merely states in most general terms matters already of public record. No violation of the regulations cited emerges. As for future

> cooperation between the Justice Department and the Investigating Committee, that has been resolved by In re Petition, 576 F. Supp. 1275 (S.D. Fla. 1983), aff'd, 735 F.2d 1261 (11th Cir. 1984). Finally, the due process allegations against the Investigating Committee defendants in Count Four represent yet another attempt by Judge Hastings to shortcircuit the exclusive review process vested by the Act in the judicial councils and the Conference, and this Court cannot consider them. See 28 U.S.C. § 372(c)(10). Thus no cause of action is stated in Count Four.

593 F. Supp. at 1385.

In support of his appeal from the District Court's ruling against his Count One claim that the Act is facially unconstitutional, Judge Hastings raises the same three arguments rejected by the District Court. Judge Hastings also appeals the District Court's unfavorable ruling on Counts Two through Four. We hold that adjudication of both Counts One and Two is premature. We affirm the

dismissal of Counts Three and Four, although for reasons different from those stated by the District Court.

IV

Count One of appellant's complaint touches matters of profound importance for the federal judicial system. The need for some means by which federal judges might "put their own house in order," Chandler v. Judicial Council, 398 U.S. 74, 85 (1970), has been recognized since 1939, when a committee of distinguished jurists chaired by Chief Justice Hughes successfully proposed the statutory organization of the judicial councils and the Judicial Conference. See id. That those bodies could constitutionally be vested with some powers by which to effect the goals of the 1939 Act seems also to be established. See id. at 86 n.7 ("We see no constitutional obstacle preventing Congress from

vesting in the Circuit Judicial Councils, as administrative bodies, authority to make 'all necessary orders for the effective and expeditious administration of the business of the courts within [each] circuit.'") Nevertheless, the precise limits to the powers that could constitutionally be exercised by the judicial councils and the Judicial Conference have yet to be judicially defined. Indeed, before the 1978 Act, no particular powers were statutorily conferred; the assumption seems to have been that the self-administrative power of the judiciary was implicit in the very structure of the judicial councils and the Judicial Conference. The Supreme Court, however, expressed discomfort with such a vague scheme in Chandler, supra,[6] and

6. Chandler involved a separation-of-powers challenge by a federal district judge to an order by the Judicial Council

Congress, in the 1980 Act, responded by vesting specific investigative and disciplinary powers in the judicial councils and the Judicial Conference.

As to each of the investigatory and disciplinary powers conferred by the Act, there may be a question of whether Congress may lawfully vest such power in an administrative organ of the federal judiciary composed of Article III judges. Regardless whether such a question may be asked, however, a court may provide an answer only in an appropriate adjudicatory setting.

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6. (Continued)
of the Tenth Circuit finding the judge unable or unwilling to discharge his duties efficiently and directing that no additional cases be assigned to the judge until further order of the Council. The Supreme Court declined to reach the merits of the judge's challenge on the ground that he had failed to seek relief initially from the Council itself.

Whether the District Court correctly deemed appellant's suit to be a proper occasion on which to decide these important matters depends upon what had happened to appellant by the time of the District Court's decision. The record reveals that a complaint had been filed against appellant; the chief judge of the circuit in which the complaint was filed had formed an investigative committee of judges; and the investigation had begun. Precisely how far it had progressed the record does not tell. We do know, however, that the committee had not yet issued a report of its conclusions and recommendations to the Council for any further action deemed proper.

When such a report does eventually issue, it may recommend that the Council invoke one or another of its delineated disciplinary powers. The report, however,

may well urge the Council to transfer the proceedings directly to the Judicial Conference, or, alternatively, to conclude the proceedings against appellant. Even if some disciplinary measure were recommended to the Council, the Council would be free to reject that recommendation and decline to impose any sanction on appellant. Moreover, should the council determine to exercise any of its specified disciplinary powers, that determination would be reviewable upon petition to the Judicial Conference. The Conference would then have before it the same panoply of options available to the Council, including the option of concluding the proceedings. The Conference would also be free to recommend impeachment to the House of Representatives.

We belabor the possible outcomes under the Act only to demonstrate that they are, as yet, only possibilities. Anything might happen in the proceedings initiated against appellant, from early dismissal to a recommendation of impeachment. Of the powers the Act vests in the judicial administrative organs, few, some, or many may be invoked against appellant. Yet appellant asks this court for a declaration that none of the powers vested by the Act can constitutionally be exercised.

It is an established and salutary principle of the law of federal courts that constitutional issues affecting legislation will not be determined "in advance of the necessity of deciding them" or "in broader terms than are required by the precise facts to which the ruling is to be applied." Rescue Army v. Municipal

Court of Los Angeles, 331 U.S. 549, 569 (1947). Even for those cases that are clearly within the limits of federal jurisdiction, the Supreme Court has "developed for its own governance . . . a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision." Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring). As the Court has stated:

> This Court has recognized in the past that even when jurisdiction exists it should not be exercised unless the case "tenders the underlying constitutional issues in clean-cut and concrete form." Rescue Army v. Municipal Court, 331 U.S. 549, 584 (1974). Problems of prematurity and abstractness may well present "insuperable obstacles" to the exercise of the Court's jurisdiction, even though that jurisdiction is technically present. Id. at 574.

Socialist Labor Party v. Gilligan, 406 U.S. 583, 588 (1972).

The principle of constitutional avoidance was well illustrated by a pair of opinions in the same case, the first by this court, Buckley v. Valeo, 519 F.2d 821 (D.C. Cir. 1975), and the second by the Supreme Court, 424 U.S. 1 (1976). Buckley involved a multipronged attack on the Federal Election Campaign Act of 1971. One aspect of the attack was a challenge to the constitutionality of the method of appointment to, and powers to be exercised by, the newly-created Federal Election Commission. This court reached the merits only of the appointment issue and the validity of one of the Commission's powers--the power to issue advisory opinions. The former issue was clearly adjudicable because the Commission had already been appointed. The latter issue

was also adjudicable because an advisory opinion might, under the statute, be issued at any time.

The Court declined, however, to pass on the constitutionality of the statutory conferral upon the Commission of the remaining powers challenged in the lawsuit--namely, the power to disqualify candidates for office, to enact rules, to conduct investigations using, if necessary, the power of subpoena, and to initiate civil actions. The Court stated its underlying reasoning thus:

> In its present stance, this litigation does not present the court with the concrete facts that are necessary to an informed decision. No party has been joined in a civil enforcement action initiated by the Commission; no one has been disqualified from running for office; the Commission has enacted no rules; nor has any party been adversely affected by the exercise of most of the Commission's broad powers under 2 U.S.C. §§ 437d, 437g. In fact, some of the issues presented to us in the certified

> questions may never reach a stage at which they would be ripe for adjudication.

519 F.2d at 893 (citations and footnotes omitted).

In reviewing the decision of the Court of Appeals, the Supreme Court reached the merits of the constitutionality of each of the Commission's statutory powers. The Court's opinion, however, did not call into question the reasoning or judgment of the Court of Appeals. Rather, the Court's discussion implicitly reaffirmed the principle of constitutional avoidance underlying the Appeals Court's decision:

> Since the entry of judgment by the Court of Appeals, the Commission has undertaken to issue rules and regulations under the authority of § 438(a)(10). While many of its other functions remain as yet unexercised, the date of their all but certain exercise is now closer by several months than it was at the time the Court of Appeals rules.

424 U.S. at 115-17. The Court thus made clear that, only because the exercise of the Commission's various powers was imminent and "all but certain," was it justified in deciding the constitutionality of those powers.

In the instant case, as in Buckley, appellant asks this court to pass on the constitutionality of an entire Act of Congress that vests in an entity a host of powers, most of which have not been invoked and many of which may never be invoked in the proceedings concerning appellant. To decide the legitimacy of powers whose exercise is the antithesis of "all but certain" would clearly contravene the principle of constitutional avoidance underlying both this court's and the Supreme Court's decisions in Buckley, the principle that "the quarrel must be with the official and not the statute book."

P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, Hart & Wechsler's Federal Courts and the Federal System 141 (2d ed. 1972).

Concededly, certain informal fact-gathering powers have been exercised by the Committee. Under Buckley, this Court might seem justified in deciding the constitutionality of such powers. To do so, however, would contravene another aspect of avoidance--the policy of rendering judgment on the constitutionality of proceedings while the proceedings themselves are going on. As Chandler found, action by the judicial councils "has few of the characteristics of traditional judicial action and much of what we think of as administrative action." 398 U.S. at 88 n.10. The Councils, in short, are essentially "administrative bodies." Id. at 86 n.7.

As is traditional in judicial review of administrative action, a court should be loath to interfere, by means of injunction, with ongoing proceedings by a particular council. See Abbott Laboratories v. Gardner, 387 U.S. 136, 148-49 (1967); 4 K. Davis, Administrative Law Treatise § 26:10, at 460 (2d ed. 1983) ("Only the most exceptional circumstances will justify a judicial interpretation of an ongoing administrative proceeding. . . ."). Like administrative agencies, as well as state courts, see Younger v. Harris, 401 U.S. 37 (1971), the councils and Conference are entitled to a measure of comity sufficient to preclude disruptive injunctive relief by federal courts absent a showing that serious and irremediable injury will otherwise result.

Appellant has not, and indeed cannot, show that such injury is likely to occur if this court does not grant his request for injunctive relief. AS discussed supra pp. 14-15, the proceeding concerning appellant may terminate at any number of points before sanctions have been imposed upon him. Moreover, appellant has available his constitutional challenge to the validity of provisions of the Act in every one of the situations in which he is exposed to the threat of injury. Thus, he may interpose his constitutional arguments, e.g., as a defense to a subpoena, as a ground for review by the Conference of a Council determination, and in a lawsuit such as this one, brought when injury is significantly more immediate and concrete than it is now. See Buckley, 424 U.S. at 116-17.

Appellant does not face the dilemma--frequently a feature of ripeness cases--of whether, on the one hand, to change his actual or intended behavior to comply with a law or regulation and in consequence to forego whatever advantage he might otherwise have gained, or on the other hand, to refuse to comply and risk initiation of a proceeding against him. See 4 K. Davis, supra, § 25:6 at 367-73 (discussing cases). That dilemma exists only when there is simply a threat of proceedings, not an actual, initiated proceeding. Appellant is therefore made no worse off by having to await final disposition of the proceeding.

In sum, we decline appellant's invitation to invalidate the entire Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 merely on the basis of the fraction of that Act that has so

far been invoked. The words of this court's opinion in Buckley are instructive:

> As might be expected in an area as novel and complex as this, which implicates all segments of the federal establishment, the manner of constituting [the Federal Election Commission], the tasks assigned to it, and the authority conferred upon it are in many respects unique. It may eventually prove to be true that some of that authority may be found, when and if exercised in a concrete context, in conflict with the Constitution. But so essential to the effective functioning of the overall legislative scheme is the existence of the new agency contrived to monitor and administer it that a court should be alert to the relationship of the agency to that scheme. The one without the other risks the frustrations and failures of the past. Unless it can clearly find that the agency is wholly without legitimacy in the very terms by which it is brought into being, the court's hand should be stayed.

519 F.2d at 888.

We must permit the proceedings against appellant to unfold as they will. In the course of time we may have a more concrete application of the Act as a whole. Then, and only then, will we be justified in deciding the facial constitutionality of the Act. Accordingly, we vacate the District Court's grant of summary judgment to appellees on Count One.

V

Adjudication of appellant's claim in Count Two that the Act has been unconstitutionally applied to him is also premature. We see no difference relevant to the policy against interference with ongoing proceedings between appellant's challenge to the facial constitutionality of the statute under which this proceeding is being carried out and his challenge to the constitutionality of the statute as

applied in the proceeding. The same requirement of irreparable harm must therefore be met in this case, and, for the reasons stated above, appellant cannot do that. Dismissal of Count Two was therefore proper.

Our pretermission of the merits of Count Two, however, encompasses the issue of whether claims such as those raised by Count Two are precluded from judicial review, as the District Court held. That issue, like all other interpretive and Constitutional issues posed by the Act, must await an appropriate occasion for disposition. Until the applicability of the Act in an individual case is properly before a court, the preclusion vel non of questions of the Act's application is unripe. We therefore affirm only the

District Court's bare ruling of dismissal of Count Two; we do not affirm the Court's reasoning with respect to that count.

VI

We also affirm the dismissal of Count Three--the conspiracy claim--on somewhat different grounds from those enunciated by the District Court. In the litigation over whether the investigative committee would have access to the grand jury materials, see supra p. 8, one of appellant's grounds for objecting to such access was that the petition, and the investigation it initiated, were part of a conspiracy of judges to deprive him of his constitutional rights. Expressly addressing appellant's conspiracy claims, the Eleventh Circuit panel stated:

> Judge Hastings' charge that the Committee's investigation is part of a larger conspiracy is not a proper subject for consideration in this appeal. The investigation is being conducted pursuant to the Act

> and the district court was not the proper forum for addressing any underlying questions of constitutional abuse. Those concerns may be raised by Judge Hastings in a challenge to the actions, if any, taken by the Judicial Council.[10]
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> 10. Under section 372(c)(10) a judge aggrieved by an action of the judicial council of the circuit may petition the Judicial Conference of the United States for review of that action.

In re Petition, supra, 735 F.2d at 1275 & n.10.

In view of this holding, we cannot but conclude that appellant has already had a full and fair opportunity to litigate his claim of conspiracy. The Eleventh Circuit's holding that such a claim is barred by § 372(c)(10) of the Act is binding on Judge Hastings for all future litigation between himself and the committee over matters related to this investigation. Appellant may not reassert

his conspiracy claim in this or any other court. See National Treasury Employers Union v. Internal Revenue Service, No. 84-5548, slip op. at 3 (July 9, 1985) (collecting authorities).

We wish to make clear, however, that our ruling is not intended as an endorsement of the Eleventh Circuit's view of the preclusion issue raised by appellant's conspiracy claim. We herein express no view ourselves on that issue.

VII

As to Count Four, we are satisfied that dismissal was proper, although again for reasons somewhat different from the District Court's. The disclosures by Justice Department officials to the Investigative Committee concerning the criminal proceedings against Judge Hastings were proper as a "routine use" under the Privacy Act, 5 U.S.C. § 552a(a)

(7), (b)(3), (e)(3)(D), and the applicable regulations, see 42 Fed. Reg. 53,288, 53,332. Moreover, even if a claim of a violation of the Privacy Act could be made out, appellant would not be entitled to the declaratory and injunctive relief he seeks, such relief not being among those expressly made available to remedy past disclosures made in violation of the Privacy Act. See 5 U.S.C. § 552(a)(g)(1); see also Clarkson v. IRS, 678 F.2d 1368, 1375 n.11 (11th Cir. 1982); Hanley v. Department of Justice, 623 F.2d 1138, 1139 (6th Cir. 1980); Parks v. INS, 618 F.2d 677, 684 (10th Cir. 1980); Cell Associates, Inc. v. NIH, 579 F.2d 1155, 1160-61 (9th Cir. 1978).[7]

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7. With regard to the due process claims in Count Four, we find them meritless. Even if, as appellant suggests may be the case, the request by the Committee for the information supplied by the government did not satisfy the statutory requirement of a

In sum, we hold that, at the time the District Court rendered its decision, adjudication of Count One was premature, and we therefore vacate the District Court's grant of summary judgment to appellees on Count One. For the same reason, we hold that dismissal of Count Two was proper, although we do not affirm the ruling of the District Court that judicial review of Count Two is barred by the Act. Finally, we affirm the dismissal of Count Three on grounds of collateral estoppel and affirm the dismissal of Count Four as proper under the terms of the Privacy Act. We remand this case to the District Court for entry of an order of dismissal without prejudice.

It is so ordered.

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7. (Continued)
writing, that technicality would hardly rise to the level of a violation of due process rights.

Edwards, Circuit Judge, concurring:

PROLOGUE

At the birth of our nation, Alexander Hamilton charted one of the fundamental precepts upon which our system of government is founded:

> [The] independence of the judges is. . . requisite to guard the constitution and the rights of individuals [against legislative encroachments and] from the effects of those ill humours which the acts of designing men, or the influence of particular conjunctures, sometimes disseminate among people.[1]

For the nearly 200 years that have passed since Hamilton wrote these words, we have endeavored to preserve an independent judiciary as a "citadel of the public justice and the public security."[2] Our

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1. THE FEDERALIST No. 78, at 527 (A. Hamilton) (J. Cooke ed. 1961).

2. Id. at 524.

Founding Fathers were clear in their determination to reject the English tradition which had fostered legislative interference with the regular courts of justice.[3] And, regardless of differences in legal philosophy, proponents of judicial activitism and judicial restraint alike have long agreed that, in order to fulfill its designated constitutional role, the judiciary must be independent in all ways that might affect substantive decisionmaking.

In light of our long tradition of an independent judiciary that has been largely free from legislative tampering, it is ironic that, in 1985, a member of the federal judiciary is being tried under an act of Congress that purports to define

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3. P. HOFFER & N. HULL, IMPEACHMENT IN AMERICA, 1635-1805 xi (1984).

judicial misconduct and to authorize sanctions--short of actual removal--against offending judges. What is even more curious to me is the apparently unquestioning acceptance by the judiciary of an act that may, in part, be significantly at odds with our basic constitutional structure and previously inviolate principles of separation of powers.

My concern with Judge Hastings' case has less to do with issues of individual misconduct than with a potentially unconstitutional legislative incursion into the judicial province. In our haste to assail Judge Hastings outside of the constitutionally prescribed impeachment process, we seemingly have lost sight of Hamilton's words. In our zeal for efficiency and moral purity in the judicial ranks, we may be indulging a cavalier assumption that the independence of the

judiciary will not suffer significantly from "minor" legislative encroachments. Our self-righteous finger-pointing at Judge Hastings may blind us to the reality that his case has more to do with the potential diminution of the independence of the judiciary than with the alleged misconduct of an individual judge. If Judge Hastings can be made to answer, outside of the criminal and impeachment processes, for judicially-related activities, pursuant to a loosely constructed congressional act regulating judicial "misconduct," one wonders about the sanctity of separation of powers and the inviolability of judicial independence. After this case has become ripe and is finally adjudicated, I hope that these issues will not be lost amidst cavalier assumptions or ignored because of our hesitation to deal with delicate and

difficult questions of constitutional law.

I.

As to the first two counts of Judge Hastings' complaint, I concur in Judge McGowan's able opinion holding that the case currently is not ripe to consider the constitutionality of the disciplinary provisions of the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980. 28 U.S.C. § 372(C)(1982) (the "Judicial Conduct and Disability Act of 1980" or the "Act"). I concur in the judgment as to the third and fourth counts. I write separately, however, to reflect on some grave concerns that I have with certain issues raised by this case.

II.

The misconduct with which Judge Hastings is charged--inter alia conspiracy to solicit bribes, allowing improper ex parte contacts between his staff and counsel, and total abdication of his decisionmaking authority--is precisely the sort of behavior that all would agree undermines the integrity of the judiciary and the judicial process. The Act authorizes the judicial councils for the federal circuits and the Judicial Conference of the United States to investigate such allegations of misconduct and, if a council or the Conference finds the allegations to be supported, to take disciplinary action, short of actual removal from office, against the offending judge. I worry that, in our ardor to ensure that behavior such as that of which Judge Hastings is accused not taint our

judicial system, we may be tempted to slight the serious constitutional questions that the Act poses. Fifteen years ago the late Senator Sam J. Ervin, Jr., then chairman of the Senate Judiciary Subcommittee on Separation of Powers, cautioned in connection with the contemporary clamor for judicial reform that "some deeply concerned persons would emulate the example of Sampson, who, in his blind zeal, destroyed the pillars on which the temple rested."[4] We must heed that warning today.

The constitutional questions raised by Judge Hastings are important and difficult. The case is not, as the

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4. Ervin, Separation of Powers: Judicial Independence, 35 LAW & CONTEMP. PROBS. 108, 122 (1970).

appellees seem to suggest, about whether the Act's interference with "the unfettered freedom of judges to engage in 'conduct prejudicial to the effective and expeditious administration of the business of the courts'" violates Article III. Brief for Defendants/Appellees the Judicial Conference of the United States, et al. at 37-38 (quoting 28 U.S.C. § 372(c)(1)). Rather, it is about the fundamental meaning of the guarantee of an independent judiciary under Article III. Does this guarantee mandate simply a judiciary that is largely free from control by coordinate branches or does it also compel that, appellate review and mandamus excepted, judges be independent of one another?

The Framers believed that an independent judiciary was crucial to a free republic. It is clear that to them the term "independent judiciary" meant at

least that the judiciary be essentially separate from the other "great departments of power."[5] Quoting Montesquieu's Spirit of the Laws, Alexander Hamilton declared in The Federalist No. 78 that "'there is no liberty, if the power of judging be not separated from the legislative and executive powers.'"[6] These same views were echoed by James Madison at the Constitutional Convention:

> Judges should not hold their places by. . . [uncertain] tenure. . .[b]ecause they might be tempted to cultivate the Legislature, by undue complaisance, and thus render the Legislature the virtual expositer, as well as the maker of the laws.[7]

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5. THE FEDERALIST No. 47, at 324 (J. Madison).

6. THE FEDERALIST No. 78, at 523.

7. 2 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 34 (rev. ed. 1966).

To insulate the judiciary from pressure from the other branches, the authors of the Constitution granted federal judges life tenure, subject to a good behavior requirement, and freedom from potentially coercive reductions in their salaries. U.S. Const. art. III, § 1. The Constitution has long been understood to establish impeachment as the only method available to the coordinate branches for the actual removal of judges from offices. U.S. Const. art. I, §2, cl. 5 and § 3, cl. 6; art. II, § 4. As Hamilton explained, "[t]his is the only provision on the point, which is consistent with the necessary independence of the judicial character."[8] History thus teaches us that the Framers "hoped to make the judges free from popular pressure and

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8. THE FEDERALIST no. 79, at 533.

from legislative control. Their purpose was to create a truly independent judiciary limited only by the cumbersome process of impeachment."[9]

The relevance of Article III's guarantee of an independent judiciary and of the Impeachment Clause to the authority of the judiciary to remove (or discipline) its own members for misconduct is somewhat less certain and has been vigorously debated by lawyers, scholars, and jurists for the last half century.[10]

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9. Ziskind, Judicial Tenure in the American Constitution: English and American Precedents, 1969 SUP. CT. REV. 135, 153.

10. Compare Kurland, The Constitution and The Tenure of the Federal Judges: Some Notes from History, 36 CHI. L. REV. 665 (1969) (contending that impeachment is the only constitutional means of removal); Ziskind, supra note 9 (same); Fishburn, Constitutional Judicial Tenure Legislation? The Words May be New, But the Song Sounds the Same, 8 HASTINGS CONST. L.Q. 843, 865-67 (1981) (same); Chandler v. Judicial Council, 398 U.S. 74, 129-43 (1970) (Justices Douglas and Black dissenting from the denial of Judge

The answer to this question seems to require the resolution of at least two preliminary issues. First, is the constitutional guarantee of an independent judiciary, which is implicit in the promises of life tenure and salary protection under Article III, intended to secure the independence of individual judges as well as of the judiciary as an entity? Second, if the guarantee is meant

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10. (Continued)
Chandler's petition for a writ of mandamus or prohibition, arguing that the Constitution does not permit the judiciary to discipline its ranks); Ervin, supra note 4 (arguing that the judiciary may not constitutionally discipline its members); and Kaufman, The Essence of Judicial Independence, 80 COLUM. L. REV. 671 (1980) (same, in particular criticizing the Judicial Conduct and Disability Act of 1980), with R. BERGER, IMPEACHMENT 122-80 (1973) (arguing that the judiciary may constitutionally remove judges from office, using Article III's good behavior standard as a measure) and Shartel, Federal Judges-Appointment, Supervision, and Removal--Some Possibilities under the Constitution, 28 MICH. L.REV.870 (1930) (same).

to preserve the independence of individual judges, can such independence be maintained without protection against pressure from peers?

I firmly believe that the guarantee of independence runs to individual judges as well as to the judicial branch. Article III's explicit assurances of life tenure and undiminished salaries pertain directly to individual judges. Moreover, how could the underlying purpose of these assurances--to foster independent decisionmaking--be achieved other than by protecting the independence of individual decisionmakers? Even when judges sit in panels, our confidence in their collective decisionmaking is predicated on the assumption that each judge will make an independent and reasoned evaluation of the issues. If independent decisionmaking is

to be protected, then, individual judges must be shielded from coercion.

I am also inclined to believe that in order for Article III's guarantee of independence to be fulfilled, the Constitution must be interpreted to designate impeachment as the exclusive mechanism for disciplining or removing federal judges. First, the authors of the Constitution expressly designated impeachment as the means by which federal judges may be removed from office. In view of the Framers' concern for the independence of judicial decisionmaking and the absence of any express constitutional authority on the subject, I can find no warrant for inferring a power in the judiciary to discipline its members or remove judges for misconduct. It seems obvious that judicial independence may "just as easily

be eroded by powerful hierarchies within the judiciary itself as by outside pressures from the legislative and executive branches of the government."[11] My concern here is not for the corrupt judge who is annoyed by his or her colleagues' demonstrations of disapproval. My worry is that the provisions of the Act might be subject to abuse--that they might be misused to pressure or intimidate the non-conformist, the judge whose judicial style or legal philosophy are repugnant to the majority of his or her colleagues. As Justice Douglas aptly observed in his dissent in Chandler v. Judicial Council,

> [t]he power to keep a particular judge, from sitting on a racial case, a church-and-state case, a free-press case, a search-and-seizure case, a railroad case, an antitrust case, or a union case may have profound consequences. Judges are not fungible; they cover the constitutional spectrum; and a

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11. Ervin, supra note 4, at 125.

> particular judge's emphasis may make a world of difference when it comes to rulings on evidence, the temper of the courtroom, the tolerance for a proferred defense, and the like. Lawyers recognize this when they talk about "shopping" for a judge; Senators recognize this when they are asked to give their "advice and consent" to judicial appointments; laymen recognize this when they appraise the quality and image of the judiciary in their own community.
>
> These are subtle, imponderable factors which other judges should not be allowed to manipulate to further their own concept of the public good.

398 U.S. 74, 137 (1970).

We cannot fall prey to a natural desire to trust in our own wisdom, good will, and abhorrence of abuse of power. We must "[keep] in mind that tools created by the well-intentioned for beneficient uses may fall into less worthy hands to be used for less appropriate ends."[12]

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12. Kurland, supra note 10, at 666.

III.

In considering specific provisions of the Act, I find significant separation of powers and Impeachment Clause issues arising from the legislative attempt to authorize the judiciary to invoke disciplinary suspensions against individual members found guilty of "misconduct." Likewise, I believe that there may be serious due process questions implicated by the statutory preclusion of judicial review of actions taken against individual judges by the judicial councils and the Judicial Conference of the United States. Finally, I find very troublesome the question whether the Compensation Clause requires the Government to pay the legal fees of a judge who is the subject of a complaint under the Act.

A.

Sections 372(c)(6)(B)(iv) and 372(c)(8) of the Act permit judicial councils and the Judicial Conference to order that, "on a temporary basis for a time certain, no further cases be assigned to any judge or magistrate whose conduct is the subject of a complaint." At oral argument, the court attempted to ascertain whether the suspension provision contained any implicit time limits. When asked whether a judicial council could "temporarily" suspend a judge for fifteen years, counsel for the appellees unhesitatingly responded, "yes." It seems to me that this suspension provision, both on its face and as interpreted by the appellees, poses extraordinarily troublesome separation of powers and Impeachment Clause problems.

Initially, the suspension provision may be an unconstitutional intrusion by Congress into the province of the judiciary. It is true that the Necessary and Proper Clause, U.S. Const. art. I, § 8, cl. 18, enables Congress to provide, to some extent, for the efficient operation of the federal courts. While it is unquestioned that Congress has the power to establish (or authorize the judiciary to establish) purely administrative, "housekeeping" procedures--such as procedures for managing dockets and assigning cases--that authority does not necessarily extend beyond such administrative matters. The power of Congress to create procedures for the judiciary is constrained by the separation of powers doctrine and Article III's guarantee of an independent judiciary. I recognize that the reach of legitimate congressional

authority is not easily reduced to precise definition, yet surely it must terminate at the point where it affects in any significant way the quintessentially judicial function of substantive decisionmaking. By authorizing suspension--the total removal of a particular judge's cases--Congress arguably has interfered in the most basic way with a judge's decisionmaking authority. Furthermore, the fact that the appellees contend that Congress may sanction a fifteen-year suspension under the Necessary and Proper Clause suggests that they see no real limits on congressional power to meddle in the affairs of the judiciary--other than removal undisguised by another name. I find this expansive reading of congressional authority over the judiciary alarming and worry that if we indulge this particular incursion we will encourage

even more intrusive ones.

The separation of powers problem that arises when Congress prescribes for the judiciary more than merely administrative matters is not cured by the contention that the judiciary possesses inherent powers of self-regulation that are co-extensive with those delegated by the Act and that therefore Congress, by doing for the judiciary what it could have done for itself, has not intruded in any meaningful way into the domain of the courts. As I noted previously, I am inclined to believe that even the judiciary's inherent powers of self-regulation do not extend beyond purely administrative details. But even assuming that we do have the constitutional power to regulate and discipline our own ranks, it in no way follows that Congress should rely on that power to legislate our procedures for us under the

Necessary and Proper Clause. Out of deference to a coordinate branch, we have been reticent to intervene in Congressional affairs that are subject to internal resolution. See, e.g., Moore v. United States House of Representatives, 733 F.2d 946, 954-56 (D.C. Cir. 1984), cert. denied, 105 S. Ct. 779 (1985); Vander Jagt v. O'Neill, 699 F.2d 1166, 1172-77 (D.C. Cir.) cert. denied, 104 S. Ct. 91 (1983); Riegle v. Federal Open Market Committee, 656 F.2d 873, 881-82 (D.C. Cir.), cert. denied, 454 U.S. 1082 (1981). Reciprocal respect for the courts suggests that Congress should, and arguably must, be equally reluctant to impose its preferences on the judiciary's governance of its internal affairs.

If counsel for the appellees was correct in asserting that the suspension provision permits suspension of a judge

for significant periods of time, I believe that the Act may also unlawfully delegate congressional responsibility under the Impeachment Clause to the judiciary. Suspension for a fifteen year period strikes me as being the functional equivalent of removal. Should effective removal be available through council and Conference proceedings, Congress would retain little incentive to put itself through the cumbersome, time-consuming and painful process of impeachment, which I believe the Framers intended to be the exclusive method of removing federal judges from office. This facile circumvention of the Constitution should not be countenanced.

B.

The provision of the Act precluding judicial review of council and Conference orders and determinations also poses difficult issues, with regard to both the

scope of preclusion and the effect preclusion might have on the constitutionality of the Act's vesting of investigative and adjudicative authority in the councils and Conference.

Section 372(c)(10) provides:

> A complainant, judge, or magistrate aggrieved by a final order of the chief judge under paragraph (3) of this subsection [orders dismissing the complaint or concluding the proceedings] may petition the judicial council for review thereof. A complainant, judge, or magistrate aggrieved by an action of the judicial council under paragraph (6) of this subsection [authorizing further investigation and sanctions] may petition the Judicial Conference of the United States for review thereof. The Judicial Conference, or the standing committee. . . ., may grant a petition filed by a complainant, judge, or magistrate under this paragraph. Except as expressly provided in this paragraph, all orders and determinations, including denials of petitions for review, shall be final and conclusive and shall not be judicially reviewable on appeal or otherwise.

(Emphasis added). It is difficult to determine from the text of this provision whether Congress intended to preclude judicial review only of substantive decisions of the councils and Conference or whether it intended, in addition, to preclude review of challenges to the legality of council and Conference decisionmaking processes, such as Judge Hastings' allegation that his right to due process had been infringed upon by the inclusion on the Eleventh Circuit Council's Investigating Committee of judges who were biased against him and who had conspired to drive him from office. The Supreme Court has often noted that "'only upon a showing of "clear and convincing" evidence of contrary legislative intent should the courts restrict access to judicial review.'" Lindahl v. Office of Personnel Management, 105 S. Ct. 1620,

1627 (1985) (quoting Abbott Laboratories v. Gardner, 387 U.S. 136, 141 (1967)). Resolution of the scope of section 372(c)(10)'s preclusion of judicial review will require careful consideration not only of the provision's "'express language, but also [of] the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved.'" Id. (quoting Block v. Community Nutrition Inst., 104 S. Ct. 2450, 2454 (1984)). We should be especially cautious in determining that Congress wished to preclude review where such a conclusion would mean, as here, that all judicial review of a constitutional claim would be barred.[13]

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13. The possibility of discretionary review by the councils and the Conference does not alleviate my concerns regarding the preclusion of judicial review of claims of due process violations. First, a council or the Conference may refuse to hear such a claim. Second, if the claim

If, however, section 372(c)(10) is interpreted to bar all judicial review of claims of illegality in the decisionmaking process, including claims of actual bias, the constitutionality of the Act's combination of investigative and adjudicative powers in the same bodies would be called into serious question. It is true, as the appellees note, that in Withrow v. Larkin the Supreme Court held that the mere combination of investigative and adjudicative functions in administrative adjudications does not automatically create a presumption of bias. 421 U.S. 35, 47 (1975). The Withrow Court, however, assumed that judicial claims of

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13. (Continued)
is that the Conference has violated a judge's right to due process, the Act offers no provision for review.

actual bias was available. Id. at 54-55 & n. 21. Withrow, therefore, would not be dispositive of the constitutionality of the Act, should the Act be held to preclude judicial review of claims of actual bias. Under those circumstances due process might require a separation of functions.

C.

Finally, I am seriously troubled by Judge Hastings' argument that if the Act is interpreted not to provide for Government subsidization of the legal expenses of a judge accused of wrongdoing under the Act, it may violate the Compensation Clause. The purpose of that clause, which states that judges "shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office," U.S. Const., art. III, § 1, is to

strengthen the independence of the judiciary against Congress. As the Framers understood, "a power over a man's subsistence amounts to a power over his will."[14] But if his remuneration be secure, "[a] man may then be sure of the ground upon which he stands, and can never be deterred from his duty by the apprehension of being placed in a less eligible situation."[15]

The standard that federal courts have applied to determine whether an indirect reduction in income, such as that alleged by Judge Hastings, violates the Compensation Clause is that

> "[i]ndirect, nondiscriminatory diminishments of judicial compensation, those which do not amount to an assault upon the independence of the third branch or any of its members, fall outside the protection of the Compensation Clause."

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14. THE FEDERALIST No. 79, at 531 (A. Hamilton) (emphasis in original).

15. Id. at 532.

Duplantier v. United States, 606 F.2d 654, 669 (5th Cir.), reh'g denied, 608 F.2d 1373 (1979), cert. denied, 449 U.S. 1076 (1981) (quoting Atkins v. United States, 556 F.2d 1028, 1045 (Ct. Cl. 1977), cert. denied, 434 U.S. 1009 (1978).

Utilizing this standard, the court in Duplantier upheld the penalty provisions of the Ethics in Government Act that pertain to federal judges. 28 U.S.C. App. § 304(a). The court observed that in that case there was "no 'plan fashioned by the political branches. . .ineluctably operating to punish the judges qua judges,'" and emphasized that Congress had imposed precisely the same penalty for failure to file financial reports on members of Congress and on members of the executive branch. 606 F.2d at 669 (quoting Atkins, 556 F.2d at 1054). Similarly, in Atkins, the Court of Claims held that a seven-year

"freeze" on judicial pay during a period of inflation did not offend the Compensation Clause. The court explicitly noted that judges were not the only targets of the freeze; certain other government employees had been included. The court reasoned that

> [i]f Congress intended to mount an attack on the independence of the judiciary by means of a salary freeze in the face of high inflation, why would it have included in the freeze the top level civil servants and even, to a lesser extent, its own Members?. . . Reasons other than a desire to punish the judges or drive them from office appear to lie behind the 7-year omission of a pay raise.

556 F.2d at 1055-56 (footnote omitted).

By contrast to the congressional action (or inaction) at issue in Duplantier and Atkins, the Judicial Conduct and Disability Act of 1980 is directed at judges qua judges. If the Act were interpreted to preclude Government sub-

sidization of defendant judges' legal expenses, the salaries of individual judges, who are singled out by the complaint process, would be reduced by legal fees. Because the cost of defending against a complaint can be substantial,[16] this reduction may be significant. In considering the Compensation Clause issue, we must again remember that our constitutional concerns lie not with the unsympathetic plight of the corrupt judge who must pay for his or her misdeeds, but with the possibility that the threat of exorbitant defense expenses might chill the independent decisionmaking of a nonconformist judge.

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16. One federal judge reportedly spent $70,000 defending himself against a complaint that ultimately was dismissed. See Note, Unnecessary and Improper: The Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, 94 Yale L.J. 1117, 1142 (1985).

IV.

Although I have no reason to doubt the integrity of members of the federal judiciary, I am willing to assume that there may be a few corrupt judges, who dishonor their title and role in our society. This does not change my view, however, that the Constitution specifies only one procedure for disciplining them--impeachment. The fact that, in practice, impeachment may be so difficult that unworthy judges are not often removed from office does not give either Congress or the judiciary license to fashion an alternative, more efficient method of dealing with the problem. "Convenience and efficiency are not the primary objectives--or the hallmarks--of democratic government." Immigration and Naturalization Service v. Chadha, 462 U.S. 919, 944 (1983). Chadha concerned the constitu-

tionality of the legislative veto; however, many of the Court's observations about the Framers' conscious choice to eschew a certain modicum of efficiency in government in order to preserve higher values are pertinent in this case. In my view, the Framers' choice here was to limit the accountability of individual judges for misconduct to impeachment in order to maximize judicial independence.

To paraphrase the Court in Chadha, the choice that I "discern as having been made in the Constitutional Convention [may] impose burdens on [judicial accountability] that . . . seem clumsy, inefficient, even unworkable, but those hard choices were consciously made by men who had lived under a form of government that permitted arbitrary [interference with judicial independence] to go unchecked. There is no support in the Constitution

. . . for the proposition that the cumbersomeness and delays often encountered in complying with explicit Constitutional standards [i.e., impeachment] be avoided, either by the Congress or by the [judiciary]." Id. at 959.

An independent judiciary is, as the Framers understood, a principal guarantor of our liberty. We must temper our eagerness to see that only honorable and dedicated women and men fill the judicial ranks with an awareness of the danger to the judiciary of impairing independence and inhibiting diversity of style and opinion among jurists. Should we fail to do so, we may find that "the hope for an independent judiciary will prove to have been no more than an evanescent dream." Chandler, 398 U.S. at 143 (Black, J., dissenting).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

The Honorable ALCEE L. HASTINGS,	)	
Plaintiff,	)	
v.	)	Civil Action No. 83-3850
JUDICIAL CONFERENCE OF THE UNITED STATES, ET AL.,	)	
Defendant.	)	

MEMORANDUM

United States District Judge Alcee L. Hastings brought this action seeking to enjoin an ongoing investigation of his judicial conduct by an investigative committee of the Judicial Council of the Eleventh Circuit. The investigation was begun pursuant to the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, Pub. L. No. 96-458, 94 Stat. 2035 (1980), 28 U.S.C. §§ 331, 332, 372(c), 604. Judge Hastings seeks a declaration that the Act is unconstitu-

tional on its face and as applied to him. These issues are before this Court on cross-motions for partial summary judgment, which have been fully briefed and argued,[1] along with the defendants' motion to dismiss certain counts on grounds of ripeness and subject-matter jurisdiction.

Judge Hastings filed this action on December 23, 1983. The amended complaint names as defendants the Judicial Conference of the United States, the governing body of the federal court system on which all circuits are represented by a circuit judge and a district judge; the Chief Justice of the United States in his official capacity as presiding officer of the Conference; the Standing Committee of

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1. The Washington Legal Foundation has filed a brief amicus supporting defendants.

the Judicial Conference;[2] the Judicial Council of the Eleventh Circuit, the governing body of judges for that circuit; the Chief Judge of the Eleventh Circuit, John C. Godbold; the members of the Investigating Committee, Judges Godbold, Tjoflat, Johnson, Pointer and O'Kelley;[3] and, in Count Four, the Attorney General of the United States, William French Smith, who is joined with other defendants

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2. The Conference has named a Standing Committee as authorized by the Act to exercise the power of the Conference over judicial conduct matters. See 28 U.S.C. §§ 331, 372(c)(10), (12), (14), (15). This committee is known as the Committee to Review Circuit Council Conduct and Disability Orders. It is referred to herein as the Standing Committee.

3. Judges in the Eleventh Circuit named defendants and that Circuit's Judicial Council have waived objections to venue. Other preliminary issues going to the Court's jurisdiction are discussed later.

in a Privacy Act claim.[4]

While the complaint states a multitude of prolix and sometimes inconsistent constitutional claims, Judge Hastings' basic contentions are: (1) that the Act interferes with the constitutional guar- guarantee of an independent judiciary by providing machinery for disciplining judges and delegating impeachment powers to the judiciary, in violation of the separation of powers doctrine, and (2) that the Act, both on its face and as

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4. The amended complaint contains four counts. Count One claims that the Act on its face violates the separation of powers doctrine and the due process rights of judges under inquiry. Count Two, while incorporating the Count One claims, focuses on the application of the Act to Judge Hastings, alleging that the investigation of him has already violated his due process rights and will violate his rights in the future. Count Three alleges a conspiracy among Judges of the Eleventh Circuit to violate plaintiff's constitutional rights, and Count Four is the Privacy Act count.

applied to him, violates due process rights.

I. The Act

The Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 culminated nearly 50 years of consideration by Congress and the federal judiciary of the best means to assure responsible judicial conduct consistent with the constitutionally protected independence of the judicial branch.

At the urging of Chief Justice Hughes and other distinguished federal judges, Congress in 1939 created judicial councils for each circuit empowering them to "make all necessary orders for the effective and expeditious administration of the business of the courts" in each circuit. Administrative Office Act of 1939, Pub. L. No. 76-299, 53 Stat. 1223, 28 U.S.C. § 332. Under this authority the judicial branch

has proceeded to run its affairs by negotiation, rules and persuasion. In 1970, the Supreme Court in Chandler v. Judicial Council of the Tenth Circuit, 398 U.S. 74 (1970), noted that it was "reasonable, proper, and necessary" for the federal courts to have rules governing the management of court business and that "the need for enforcement [of such rules] cannot reasonably be doubted." Id. at 85. But the Court expressed concern about the lack of specificity in the 1939 Act's definition of the scope of the judicial councils' powers and called for legislation to clarify the enforcement power of the councils against recalcitrant judges and the method of review of their orders. Id. at 85 n.6.

The 1980 Act evolved from this background after long and careful legislative deliberation. Congress was acutely aware

of the need both to preserve fundamental judicial independence and at the same time to enable the judiciary "to put its own house in order" by providing tools to implement the judiciary's own disciplinary procedures where necessary to assure judicial accountability. Both House and Senate leaders agreed that

> The goals of the ... legislation are to improve judicial accountability and ethics, to promote respect for the principle that the appearance of justice is an integral element of this country's justice system, and, at the same time, to maintain the independence and autonomy of the judicial branch of government.

H.R. Rep. 1313, 96th Cong., 2d Sess. 1 (1980); 126 Cong. Rec. S13,858 (daily ed. Sept. 30, 1980)(remarks of Sen. DeConcini).

As will be seen from the analysis of the Act that follows, the judicial councils were authorized to hold investi-

gative hearings aided by subpoena power and impose specific sanctions short of removal from office. Procedures for receiving and processing complaints from the public were also enacted to promote public confidence in the federal judiciary.

This formal investigative machinery was expected to be rarely used. Congress emphasized, as did many judges and others supporting the legislation, that informal resolutions by negotiation, discussion and debate among judges were to be preferred and should continue to be used as under the 1939 Act. S. Rep. No. 362, 96th Cong., 1st Sess. 3-4 (1979), reprinted in 1980 U.S. Code Cong. & Ad. News 4315, 4317. However, it was equally clear that on occasion informal resolution would

prove ineffective due to the nature of the issue presented, factual disputes or stubborn intransigence.

The Act provides that any person alleging that a judge "has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts, or alleging that such a judge . . . is unable to discharge all the duties of office by reason of mental or physical disability," may file a written complaint with the clerk of the court of appeals for that circuit, 28 U.S.C. § 372(c)(1), which the clerk is required to send to the judge involved and to the Chief Judge of the circuit.

If the Chief Judge does not dismiss

the complaint[5] or conclude the proceeding on grounds that corrective action has been taken, 28 U.S.C. § 372(c)(3)(B), he must appoint a special committee, as was done in this case, consisting of himself and equal numbers of district and circuit judges of the circuit, to investigate the complaint. 28 U.S.C. § 372(c)(4)(A).

The judge under inquiry has a right to "adequate prior notice of any investigation." 28 U.S.C. § 372(c)(11)(A). He or she also is entitled to "an opportunity to appear (in person or by counsel) at proceedings conducted by the investigating

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5. The statute provides for dismissal by the chief judge if he finds a complaint "frivolous," "directly related to the merits of a decision or procedural ruling," or not in conformity with the Act's complaint-filing requirement. 28 U.S.C. § 372(c)(3)(A). As of June 30, 1983, 237 complaints had been filed since the Act took effect. Six of those proceeded to the investigative stage.

panel, to present oral and documentary evidence, to compel the attendance of witnesses or the production of documents, to cross-examine witnesses, and to present argument orally or in writing.[6] 28 U.S.C. § 372(c)(11)(B).

The investigating committee is charged with conducting an "investigation as extensive as it considers necessary," and to expeditiously file a written report with the circuit's judicial council stating the committee's findings and recommended action. 28 U.S.C. § 372(c)(5). The

6. The Act specifies these rules as the minimum due process safeguards to be contained in rules established by each judicial council and the Conference for the conduct of proceedings. Councils are free to provide greater protections, and some have done so. See generally Burbank, Procedural Rulemaking Under the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, 131 U.Pa. L. Rev. 283 (1982). The Eleventh Circuit rules generally track the Act's provisions. See id.

committee, like the judge, has "full subpoena powers." 28 U.S.C. § 372(c)(9)(A).

The judicial council then "shall take such action as is appropriate to assure the effective and expeditious administration of the business of the courts within the circuit." 28 U.S.C. § 372(c)(6)(B). Such action may include, but is not limited to, censuring or reprimanding the judge publicly or privately, temporarily "for a time certain" ordering that no new cases be assigned to the judge, requesting that the judge voluntarily retire at full salary, or certifying the disability of the judge.[7] 28 U.S.C. § 372(c)(6)(B). However, the council cannot remove from office any judge appointed to hold office

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7. See 28 U.S.C. § 372(b) for the procedures following a certification of disability.

during good behavior. 28 U.S.C. § 372(c)(6)(B)(vii)(I).

Written notice of any action taken must be sent immediately to the judge under inquiry and to the complainant, and also is to be available to the public in the clerk's office of that circuit's court of appeals.[8] 28 U.S.C. § 372(c)(6)(C), (15). The judicial council may conduct any further investigation it believes necessary before action on the investigating committee's recommendation, and subpoena power is provided, 28 U.S.C. § 372(c)(6)(A).

The council has discretion to refer any complaint and record of related

8. Actions taken by the Judicial Conference or its standing committee also are to be made available to the public in the clerk's office of the appropriate circuit. All such orders are to be accompanied by written reasons "[u]nless contrary to the interests of Justice." 28 U.S.C. § 372(c)(15).

proceedings to the Judicial Conference of the United States. 28 U.S.C. § 372(c)(7)(A). In addition, if the council determines that the judge has engaged in impeachable conduct or conduct which "in the interest of justice, is not amenable to resolution by the judicial council," the council must certify such a finding, together with any complaint and a record of any associated proceedings, to the Judicial Conference. 28 U.S.C. § 372(c)(7)(A),(B).[9]

The Judicial Conference may affirm or reject the Council's action.[10] It may

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9. The council must notify the complainant and the judge of such action "unless contrary to the interests of justice." 28 U.S.C. § 372(c)(7)(C).

10. The Conference may delegate its powers under 28 U.S.C. § 372(c) to a Standing Committee. 28 U.S.C. § 331. The Conference has done so. See n.2 supra.

conduct further investigation of any matters referred to it by the judicial councils and has the same range of disciplinary actions open to it as to the councils. In addition, if it determines that Congress should consider impeachment, it shall send that finding to the House of Representatives along with any record of proceedings for whatever independent action the House considers appropriate. 28 U.S.C. § 372(c)(8).

The Judge under inquiry may ask the Judicial Conference, or a Standing Committee of the Conference appointed under the Act, to review the action taken by the Judicial Council. No other judicial review of council or conference action is allowed. 28 U.S.C. § 372(c) (10).

II. The Investigation

This formal statutory mechanism was invoked in March, 1983, against Judge Hastings, one of 12 active United States District Judges for the Southern District of Florida, following his trial and acquittal on criminal charges of bribery and obstruction of justice.

Judge Hastings was appointed in 1979. He was indicted on December 29, 1981, charged along with William Borders, then a Washington, D.C. attorney, with conspiring "corruptly to ask, solicit, seek, accept, receive and agree to receive, directly or indirectly, a sum of money for themselves in return for defendant Alcee L. Hastings being influenced in his performance of official acts as a United States District Judge." The indictment also alleged that Judge Hastings and Borders "obstruct[ed] and impede[d] the due administration of

Justice," in that Judge Hastings "disclose[d] to ... Borders ... the substance of a judicial order ... that had not yet been issued," gave "advance notice as to when a judicial order ... would be issued," and that Borders revealed that information to a person he believed to be a defendant in that case.

Judge Hastings moved to quash the indictment, contending that Congress alone can punish a federal judge for high crimes and misdemeanors through the impeachment process, and that the executive may not prosecute a sitting federal judge for his official acts. The motion was denied, and the denial was affirmed on appeal. United States v. Hastings, 681 F.2d 706 (11th Cir. 1982), cert. denied, 103 S.Ct. 1188 (1983). The two defendants then had separate trials.

Borders was tried first, in Atlanta. He was convicted of the bribery and obstruction counts as well as two other charges filed against him alone. Borders did not testify. The sufficiency of evidence for the conspiracy conviction of Borders was upheld on appeal in an opinion that recited in detail the evidence against Hastings. See United States v. Borders, 693 F.2d 1318 (11th Cir. 1982), cert. denied, 103 S. Ct. 1875 (1983). Confromted with the fact that Judge Hastings was the only alleged co-conspirator, the Court determined in affirming the jury's conviction of Borders on the conspiracy count that the jury must have on all the evidence properly concluded that Judge Hastings had conspired with Borders.

Judge Hastings was then tried in Miami and was acquitted on Feb. 4, 1983, because of the government's failure to meet the reasonable doubt standard.

On March 17, 1983, two judges[11] filed with the Eleventh Circuit a verified complaint invoking the Act against Judge Hastings. The complaint alleged that Judge Hastings had engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts and had violated several Canons of the Code of Judicial Conduct for United States Judges, adopted by the Judicial Conference of the United States. It

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11. The complainants were Chief Judge William Terrell Hodges, of the U.S. District Court for the Middle District of Florida, and Chief Judge Anthony A. Alaimo, of the U.S. District Court for the Southern District of Georgia. Both are members of the Eleventh Circuit Judicial Council.

focused on Judge Hastings' alleged conduct that gave rise to the indictment and on other conduct revealed and statements made by Judge Hastings in the course of the criminal proceedings.

Specifically, the complaining judges alleged that, in violation of the Code of Judicial Conduct: (1) Judge Hastings had conspired with Borders to obtain a bribe in return for an official judicial act; (2) Judge Hastings made "public and unfounded statements" that the United States was prosecuting him on racial/ political grounds; (3) Judge Hastings knowingly and publicly exploited his judicial position or acquiesced in such exploitation by others acting on his behalf by accepting financial donations from lawyers and other members of the public to defray the costs of his criminal defense; (4) Judge Hastings, by his own

testimony, had allowed ex parte contacts between his law clerk and counsel in pending cases concerning substantive issues in those cases and concerning the content of orders and opinions not yet entered, and had "completely abdicated and delegated" his judicial decision-making authority to his law clerk; (5) Judge Hastings, by his own testimony, had told counsel in a judicial proceeding that he had read an important precedent when he knew he had not and explained his deception by implying that it was common for judges to make such deliberate misstatements; (6) Judge Hastings, by his own testimony, had exploited his judicial position by soliciting funds for someone he knew was a convicted federal offender.

On March 29, 1983, in response to the complaint, John C. Godbold, Chief Judge of the Eleventh Circuit, appointed to an

investigating committee himself, United States Circuit Judges Gerald Bard Tjoflat and Frank M. Johnson, and United States District Judges Sam C. Pointer and William C. O'Kelley. The committee named John Doar, Esquire, a private attorney, as its counsel. On April 15, 1983, a news release was issued through the clerk's office of the Court of Appeals for the Eleventh Circuit, at the direction of Judge Godbold, announcing the filing of the complaint and the appointment of the investigating committee and Mr. Doar.

Judge Godbold refused Judge Hastings' request that all documents and proceedings be opened to the public. Judge Hastings also asked the United States to pay the costs of his defense. On May 6, 1983, the Director of the Administrative Office of the United States Courts advised Judge

Hastings that the Office had no authority to do so.

On June 3, 1983, the Investigating Committee filed a petition with the United States District Court for the Southern District of Florida for access to the materials of the grand jury that had indicted Borders and Judge Hastings. The Court granted the petition and at the same time denied Judge Hastings access to the materials,[12] holding that his request was premature since the Committee's work was still at the investigative stage where "the required procedural protections are minimal at most." In re Petition to Inspect and Copy Grand Jury Materials, 576

12. Judge Hastings also sought and was denied full public disclosure of the grand jury materials as an alternative to his request that the Investigating Committee be denied disclosure.

F. Supp. 1275, 1284 (S.D. Fla. 1983), aff'd, No. 84-5003, slip op. (11th Cir. June 20, 1984).[13]

The Investigating Committee has not completed its work. No report has been filed containing its recommendations nor have any hearings been held. Committee counsel indicated at oral argument that the inquiry awaits action by this Court on the motions.

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13. Both the petition in the District Court and the appeal were heard by designated judges because all the judges of the District Court of the Southern District of Florida recused themselves, as did all the regular judges of the Court of Appeals for the Eleventh Circuit. The judges of the District Court of the Southern District of Florida have recused themselves in all matters relating to the complaint against Judge Hastings. In another somewhat related case, the appeal from and mandamus relating to Judge Hastings' decision that was allegedly influenced by a bribe, United States v. Romano, 523 F. Supp. 1209 (S.D. Fla. 1981), a panel of the Eleventh Circuit refused Judge Hastings request that all active judges of the Circuit recuse.

III. Preliminary Issues

It is against this background that the Court must first consider several threshold issues raised by the defendants concerning this Court's jurisdiction over the subject matter of the complaint and ripeness of the various claims for review. The Act provides that "all orders and determinations, including denials of petitions for review, shall be final and conclusive and shall not be judicially reviewable on appeal or otherwise." 28 U.S.C. § 372(c)(10). Defendants contend this withdrawal of jurisdiction precludes any review by this Court of Judge Hastings' claims in Count Two regarding the application of the Act to him. While there is always a basic presumption of judicial review and a Congressional intent to preclude review must be explicit, see Abbott Laboratories v. Gardner, 387 U.S.

136, 140 (1967), the language of the Act and its legislative history[14] plainly show that Congress intended to establish an absolute bar against judges under inquiry seeking judicial review of actions taken against them pursuant to the Act. Congress's power to preclude such judicial review is well established. Cf. Briscoe v. Bell, 432 U.S. 404, 414-15 (1977); Weinberger v. Salfi, 422 U.S. 749, 762 (1975).[15] Accordingly, this Court must

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14. See H.R. Rep. 1313, 96th Cong., 2d Sess. 13 (1980).

15. Whether the Due Process clause bars Congress from denying judicial review of orders and determinations under the Act is not a contention specifically raised by plaintiff's amended complaint. Given the extensive rights of review the Act does provide before mature judges of the Judicial Conference and the councils, this Court holds that the absence of more formal judicial review does not violate the Due Process clause. See Crowell v. Benson, 285 U.S. 22, 87 (1932) (Brandeis, J., dissenting); Battaglia v. General Motors Corp., 169 F.2d 254, 257 (2d Cir.), cert. denied, 335 U.S. 887 (1948).

conclude it has no jurisdiction over Judge Hastings' Count Two claims concerning the present and possible future application of the Act to him.

However, the Act does not bar judicial review of the facial validity of the statute itself. By its terms, the Act bars review only of "orders and determinations" made against individual judges. 28 U.S.C. § 372(c)(10). This was not meant to bar review of the constitutionality of the Act itself. Moreover, it is doubtful whether Congress has the power to withdraw jurisdiction from the courts of a statute's facial validity. See Johnson v. Robison, 415 U.S. 361, 366-67 (1974). Accordingly, this Court finds it does have subject-matter jurisdiction over plaintiff's Count One claims regarding the facial validity of the Act.

Defendants next claim in regard to Count One that the "only issue ripe for review is whether it is constitutional for judges to investigate judges for conduct alleged to prejudice the effective and efficient administration of the courts." Defendants' Reply filed July 5, 1984, at 3, 5. They insist that because the Judicial Council, the Judicial Conference, and the Standing Committee have not yet taken any action in Judge Hastings' case, the facial validity of the Act is too hypothetical for adjudication as to them. To so hold would prevent full judicial review of the constitutionality of the Act, because as soon as these bodies act the defendants will no doubt assert that orders issued are unreviewable. In any event, the facts do not support a ripeness challenge. The situation here is far different from those cases where a lack of

ripeness was properly found because neither the plaintiff nor the defendant agencies had engaged in conduct triggering the requisite claimed injury. See, e.g., International Longshoremen's and Warehousemen's Union, Local 37 v. Boyd, 347 U.S. 222, 224 (1954); Martin Tractor Co. v. Federal Election Comm., 627 F.2d 375, 379 (D.C. Cir.), cert. denied, 449 U.S. 954 (1980). Judge Hastings has allegedly engaged in conduct triggering the Investigating Committee's present work. Given the seriousness of the misconduct alleged, it seems disingenuous for defendants to suggest that action by the Judicial Council, the Standing Committee or the Conference is remote and uncertain in his case. Nor would the occurrence of any future acts provide significant new facts to aid this Court's adjudication of the Act's facial validity. See Duke Power Co.

v. Carolina Environmental Study Group, 438 U.S. 59, 82 (1978); Regional Rail Reorganization Act Cases, 419 U.S. 102, 143 (1974). Principles of judicial economy also counsel against piecemeal adjudication of Judge Hastings' broad complaint, directed as it is to all aspects of the Act. The motion to dismiss on ripeness grounds is accordingly denied.

IV. Judge Hastings' Constitutional Claims

This Court therefore must, now address the plaintiff's constitutional claims.

A. Separation of Powers

Judge Hastings initially contends that Congress wholly lacks power to provide the judiciary with machinery for disciplining Article III judges because the separation of powers doctrine prevents any intrusion by the legislature into the independence of the judiciary as guaran-

teed by the Constitution. He focuses particularly on the delegation by Congress of subpoena power to the judiciary coupled with the grants of authority to discipline judges including the provision authorizing the Judicial Conference to present facts obtained by this process to the House of Representatives with recommendation for impeachment. Judge Hastings goes so far as to suggest that under the Constitution an Article III judge such as himself can only be disciplined for misconduct[16] by impeachment, and that proceedings questioning his behavior can only be held by the appropriate bodies of Congress.

Judge Hastings misconceives the purposes of the Act and his obligations

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16. By misconduct, he means a violation of the "good behavior" standard set out in Article III and in every judge's commission of appointment by the President. He concedes that bribery violates good behavior.

as a member of the judiciary. His argument lacks merit.

The Framers of the Constitution regarded an independent judiciary, free from the fear and favor of other branches of the national government, as vital to safeguard the liberty of the people and the integrity of the government. See The Federalist No. 78, at 226-33, No. 81, at 242-45 (A. Hamilton) (R. Fairfield ed. 1966); 2 J. Story, Commentaries on the Constitution of the United States 391-92 (5th ed. 1891). The independence of the judicial branch was to be secured in part by providing the individual judges with life tenure on good behavior and a salary secure from reduction. U.S. Const., art. III, sec. 1. These provisions were meant to satisfy "the imperative need for total and absolute independence of judges in deciding cases." Chandler v. Judicial

Council, 398 U.S. at 84. But in establishing a government of separated and interdependent powers, the Framers never intended that the independence of any officeholder, including judges, be so absolute as to threaten the integrity and orderly functioning of that officeholder's branch of government. The Framers, after all, feared nothing more than the tyranny of megalomaniacal despots. Thus the Constitution established, and the cases have repeatedly recognized, that the integrity and independence of the branch must take precedence over the independence of the individual officeholder. See, e.g., United States v. Nixon, 418 U.S. 683 (1974); Nixon v. Administrator of General Services, 433 U.S. 425, 441 (1977); United

States v. Brewster, 408 U.S. 501 (1972).[17]

From the early days of the Republic, limitations have been placed on the independence of any individual federal judge in order to assure the integrity and independence of the judicial branch. The first Congress recognized that a judge could be subject to criminal trial and provided that upon any conviction for bribery, he or she was to be "forever disqualified to hold any office." Act of

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17. As the Court observed in Brewster, regarding Speech or Debate Clause immunities of Congressmen designed to provide protections for the independence of that branch analogous to those considered today: "The immunities of the Speech or Debate Clause were not written into the Constitution simply for the personal or private benefit of Members of Congress, but to protect the integrity of the legislative process by insuring the independence of individual legislators." 408 U.S. at 507.

1790, ch.9, sec. 21, 1 Stat. 117.[18] In the Judiciary Act of 1789, 1 Stat. 73, the first Congress

> provided not only for the size and composition of the Supreme Court but also for the times and place for sitting, its internal organization, and other matters. It created inferior courts and prescribed membership, terms, places of sitting, and jurisdiction.

Killian, Constitutional Issues Raised by the Proposed Judicial Conduct and Disability Act of 1979, reprinted in Judicial Tenure and Discipline -- 1979-80: Hearings before the Subcommittee on Courts, Civil

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18. The Act also provided that a judge convicted of bribery could be fined and jailed, at the court's discretion. Id. Subsequent cases, including Judge Hastings' own criminal trial, have disposed of the notion that a sitting federal judge cannot be brought to criminal trial until he is removed from office by impeachment. See United States v. Claiborne, 727 F.2d 842 (9th Cir. 1984); United States v. Hastings, 681 F.2d 706 (11th Cir. 1982), cert. denied, 103 S. Ct. 1188 (1983); United States v. Isaacs, 493 F.2d 1124 (7th Cir.), cert. denied sub nom. Kerner v. United States, 417 U.S. 976 (1974).

Liberties, and the Administration of Justice, 96th Cong., 1st and 2d Sess. 705 (1980). In addition, Congress required a judge with an interest in a case to recuse, Act of May 8, 1792, ch. 36, sec. 11, 1 Stat. 278 (codified at 28 U.S.C. § 455), and made it a "high misdemeanor" for a judge to practice law, Act of December 18, 1812, ch. 5, 2 Stat. 788 (codified at 28 U.S.C. § 454). Since those early years, Congress has placed limits on individual Article III judges in many other ways, such as requiring disclosure of personal wealth (and penalizing nondisclosure),[19] mandating that criminal trials be conducted within a specified

19. Ethics in Government Act of 1978, 28 U.S.C. App. § 301 et seq. The Act's constitutionality as applied to judges was upheld in DuPlantier v. United States, 606 F.2d 654 (5th Cir. 1979), cert. denied, 449 U.S. 1076 (1981).

time,[20] and prescribing various procedural rules.[21] Congress's power to enact these and other limitations on the personal freedom of individual federal judges, pursuant to its power to make all laws "necessary and proper for carrying into Execution" the powers vested by the Constitution in the judiciary, art. I, sec. 8, cl. 18, cannot any longer be seriously doubted.

As the third branch of government, the judiciary must function. It must organize, it must have rules, it must be effectively managed. To suggest that the

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20. Speedy Trial Act of 1972, 18 U.S.C. § 3161 et seq. A claim that the Act was an "unconstitutional encroachment on the judiciary" was rejected in United States v. Brainer, 691 F.2d 691 (4th Cir. 1982).

21. See, e.g., Hanna v. Plumer, 380 U.S. 460, 471-72 (1965) (upholding congressional power under the Necessary and Proper Clause to set rules for civil procedure in federal courts).

judicial branch consists only of individual judges free to work or not work, cooperate or obstruct, uphold or demean court processes, acting however personal whim may dictate checked only by the remote chance of loss of office through impeachment, is naive and irresponsible. The independence of the judiciary depends both on the courage and integrity of individual judges and on the public perception of the institution as fair, impartial and efficient. The judiciary has the inherent power to govern itself in a manner that will achieve these ends.

The Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 represents a legitimate exercise of Congress's "necessary and proper" power to effectuate that judicial power. By redefining the composition of the Judicial Councils and enhancing and perfecting

their inherent authority, Congress was in no respect intruding upon judicial independence. Rather, it was simply recognizing the need to give the courts reasonable means to put the judiciary's own house in order. See Chandler v. Judicial Council, 398 U.S. at 85, 86 n.7. Cf. Nixon v. Administrator of General Services, 433 U.S. at 443-44. The Judicial Conference itself has recognized that placing disciplinary machinery within the judicial branch is "least disruptive of our constitutional concept of an independent judiciary." Judicial Tenure and Discipline -- 1979-80: Hearings before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice, 96th Cong., 1st and 2d Sess. 68 (1980) (statement of Hon. Elmo B. Hunter, chairman, Committee on Court Administration of the Judicial Conference of the United States).

Moreover, the Act's provision for recommending impeachment to the House of Representatives does nothing to impinge on the exclusive power of Congress over impeachment. The Judicial Conference as the highest manager of the third branch is surely entitled with or without benefit of the Act to seek the aid of Congress where removal of a judge is appropriate. If the Judicial Conference forwards an impeachment recommendation to the House of Representatives, the House is free to pursue the matter or ignore it as it chooses. Nor has the Congress made any change in its procedures or impeachment standards. There is nothing in the Constitution that bars any person or group from recommending impeachment. Judges have always been subject to this hazard and the repercussions it may carry.

Judge Hastings also contends that the impeachment provision of Article II somehow shields him from any discipline short of impeachment. But even if one accepts the much-debated proposition that impeachment is the sole means of removing an Article III judge from office, it simply does not follow that other forms of discipline that do not remove a judge from office are foreclosed.[22] Cf. Nixon v. Sirica, 487 F.2d 700, 711 (D.C. Cir. 1973)

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22. Ultimately, Judge Hastings' argument collapses of its own weight. He insists that because of the fundamental need to protect judicial independence, impeachment is the sole remedy for judicial misconduct, and that as an essential attribute of impeachment, the power to investigate judicial misconduct cannot be delegated to the judicial branch. Instead, he suggests Congress could establish an elaborate investigative machinery under its own auspices. It is difficult to see how judicial independence would be more protected by lodging the investigative apparatus in a bureaucratic agency or congressional body rather than in the judicial branch itself.

(en banc), holding that the impeachment clause does not provide special immunities from other investigative process.

To the extent Judge Hastings seems to believe that the independence of the judiciary protects an Article III judge from criticism by his peers as a matter of law, he misreads the Constitution and ignores historical precedents. Article III federal judges by the nature of their office live in the eye of the storm. Their very independence evokes disagreement and challenge. The public, the bar, the law schools, the press all comment relentlessly on judicial conduct. As public servants, judges cannot expect to be immune from criticism. That a judge's peers may find his behavior unacceptable is of no particular added consequence. Certainly, within the adjudicatory process itself a judge may receive sharp rebuke.

The Act does no more than to assure fair hearing for the judge facing possible discipline. Contrary to Judge Hastings' repeated and strident claims, the Act's disciplinary mechanism does nothing to encroach upon the essential independence of judges to decide cases in accord with their understanding of the law and to rule accordingly. In fact, Congress in this instance has again scrupulously observed the separation of powers by simply strengthening the judiciary's ability to monitor its own performance. It is the judges themselves who under the Constitution are the proper guardians of the independence and integrity of the third branch, and they must not shirk this trust.

In addition to his separation of powers arguments, Judge Hastings attacks the provisions of the Act on two broad

grounds.[23] First, he contends that the standards for misconduct are vague and overbroad. Second, he contends that the Act denies due process to judges under inquiry. Again, these challenges to the Act must be rejected.

B. Vagueness and Overbreadth[24]

The vagueness claim lacks merit. One standard for conduct subject to investiga-

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23. This case does not focus on other areas of the Act involving disability because of age or illness, early retirement, readjustment of work loads, and other comparable administrative matters because these aspects do not involve Judge Hastings' present difficulties. In any event, the analysis of the statute that follows would lead to no different result were these areas the subject of the constitutional challenge.

24. While intertwined, vagueness and overbreadth are different concepts. A law that is overbroad proscribes a substantial amount of constitutionally protected conduct. A vague law is one whose standard is so indeterminate that one cannot tell what conduct it proscribes. See Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc., 455 U.S. 489, 494-95 (1982).

tion and sanction is obviously conduct that in itself would justify impeachment, since the Judicial Conference may recommend that the House of Representatives consider impeachment. 28 U.S.C. § 372(c)(7)(B),(8). The complaint against Judge Hastings alleges that he conspired to take a bribe and to obstruct justice. It is difficult to imagine any conduct by a judge, if it occurred, more worthy of impeachment. No judge accused of these types of conduct can credibly argue that he lacked advance notice that they were forbidden.

Although it is well settled that "[o]ne to whose conduct a statute clearly applies may not successfully challenge it for vagueness," Parker v. Levy, 417 U.S. 733, 756 (1974), Judge Hastings makes a broader challenge that will be considered. He seems to contend that even if some of

his alleged conduct clearly is reached by the statute, he is still being investigated for other conduct that is too vaguely defined and that is constitutionally protected. He urges that given the broad scope of the Act, it should not withstand constitutional scrutiny.

The statutory standard, "conduct prejudicial to the effective and expeditious administration of the business of the courts," was necessarily broad.[25] The legislative history notes that this standard was "intended to include willful misconduct in office, willful and persistent failure to perform duties of the office, habitual intemperance, and other conduct prejudicial to the administration of justice that brings the judicial office

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25. Cf. Arnett v. Kennedy, 416 U.S. 134, 158-64 (1974) (upholding "for cause" removal standard of civil service statute against vagueness/overbreadth attack).

into disrepute." S. Rep. No. 362, 96th Cong., 1st Sess. 9 (1979), reprinted in 1980 U.S. Code Cong. & Ad. News 4315, 4323.[26] The legislative history further notes that this statutory standard was intended to draw guidance from the Code of Judicial Conduct for the United States Judges, published by the Judicial Conference,[27] among other sources. Id. In adopting this standard, this Court holds that Congress therefore did not intend to authorize investigation and formal proceedings against a judge for one or two isolated instances of possibly unethical

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26. The House report is to the same general effect. See H.R. Rep. No. 1313, 96th Cong., 2d Sess. 10 (1980).

27. The Conference's Advisory Committee on Judicial Activities issues advisory opinions interpreting the Code to judges who seek advance guidance for their conduct. These opinions are published regularly by the Administrative Office of the United States Courts.

or inappropriate official conduct unless such conduct, by itself, could amount to an impeachable offense. Congress recognized that a clearly established pattern of similar or disparate unethical judicial conduct, if unchecked, could so prejudice the administration of the courts and bring the judiciary into such disrepute that formal disciplinary action would be required.[28] So read, the Act is clearly

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28. It should be stressed that Congress's concern about behavior bringing the judicial office into disrepute was focused on a judge's judicial conduct and not primarily on personal extrajudicial behavior. It was for this reason that a separate standard for misbehavior, "conduct prejudicial to the administration of justice by bringing the judicial office into disrepute," was deleted by the Senate Judiciary Committee for fear that such a general disrepute standard directly embodied in the statute could be used to intrude into a judge's personal life unrelated to his or her judicial conduct. See 125 Cong. Rec. S15,385 (daily ed. Oct. 30, 1979)(statement of Sen. Thurmond). This deletion was not intended to dilute Congress's concern for the public

not vague. Cf. Roberts v. United States Jaycees, 52 U.S.L.W. 5076, 5081-82 (U.S. July 3, 1984).

Thus the statutory mechanism was intended to be available if no collegial resolution is possible for the relatively rare case where the charges, by their individual weight or by their weight as a pattern taken together, are sufficiently serious to bring into question the

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28. (Continued)
appearance of integrity in the judicial branch. See also 126 Cong. Rec. S13,860 (daily ed. Sept. 30, 1980) (remarks of Sen. DeConcini) (Act intended "to remedy matters relating to a judge's condition or conduct which interfere with his performance and responsibilities"). This legislative history further supports the conclusion that the statutory machinery was intended only for impeachable conduct or conduct showing such a pattern of misbehavior as to interfere with a judge's duties or to threaten the public's perception of the integrity of the judicial system.

integrity of the judicial system itself.[29] The complaint against Judge Hastings, if established, presents such a gross pattern of ethical violations.

Given the Act's clear emphasis on invoking the Act's investigative machinery only for serious misconduct, it was not necessary for Congress to compile an exhaustive catalogue of all forms of misconduct targeted by the Act. Indeed, it would have been impossible, because excepting those most rare cases of single impeachable acts, the pattern and the varied context of an individual judge's behavior must remain critical to determin-

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29. Indeed, this reading of the Act led Congress ultimately to reject a Senate bill that would have created a special Court on Judicial Conduct and Disability, which would have too easily allowed complaints against judges to be pressed to a formal adversary proceeding with a danger of possibly chilling judicial independence. See H.R. Rep. No. 1313, 96th Cong., 2d Sess. 18-19 (1980).

ing whether the statute's investigative processes will be invoked. Such an inquiry is too subtle for more rigid legislative codification.

Moreover, as discussed above, Judge Hastings' argument that the Act chills his and other judges' constitutionally protected independence fundamentally misconstrues the nature of the judicial independence that the Constitution was intended to protect. He continues to confuse the independence of the judiciary with his desire for unbridled personal independence.[30]

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30. In addition, the mere presence of a "chilling effect," without some other concrete harm, past or immediately threatened, is insufficient to state an overbreadth claim. See United Presbyterian Church v. Reagan, No. 83-1012, slip op. at 5 (D.C. Cir. July 17, 1984). No such harm is alleged here, only a vague and unsupported allegation of a chill to Judge Hastings' judicial independence is urged. Judge Hastings' right to decide cases assigned to him and to state his reasons is not affected.

C. Due Process

Judge Hastings' due process claims equally lack merit. He contends that the Act creates "a Star Chamber in which the accused has no right to confront the evidence against him." This is patently incorrect. The Act expressly provides a judge under inquiry with, among other rights, the opportunity to appear before the investigating committee, present evidence and compel its production if necessary, as well as to cross-examine witnesses. 28 U.S.C. § 372(c)(10). It is true that the Act does not expressly provide the same confrontational rights in its provision for additional investigation by the Judicial Council, the Judicial Conference or its Standing Committee. But such rights are implicit in the statutory design providing that additional confrontational hearings "may" be held. Congress

hardly could have intended to allow a judge's confrontational rights to be sidestepped by the device of allowing him to confront evidence at a foreshortened investigating committee proceeding, saving most of the evidence for presentation at later proceedings at which confrontation would be barred. Fairly read, the Act requires that a judge under inquiry have the right to confront all the evidence against him at whatever stage it is presented.[31] This, of course, does not mean an accused judge has a right to re-confront old evidence at every stage where

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31. The Act's provision for discretionary authority on the part of judicial councils and the Conference to conduct additional investigation if they deem it appropriate, 28 U.S.C. § 372(c)(6)(A), (8), was designed simply to give discretion to hold further hearings, not to withhold due process rights from a judge under inquiry at those hearings.

it is considered. But a judge under inquiry has the right under the Act to confront at some point all the evidence against him, and the Court so holds.

Judge Hastings' contention that the Act impermissibly combines investigative and adjudicatory power, so as to render impossible a fair adjudication, similarly lacks merit. The mere combination of such powers, by itself, does not violate due process. Withrow v. Larkin, 421 U.S. 35, 58 (1975). Judge Hastings simply has made no credible showing that under the procedures established by the Act "the risk of unfairness is intolerably high." Id. It is, of course, inevitable that in any peer-review mechanism as established here, members of judicial councils occasionally may have prior knowledge of allegations of misbehavior before they are asked to sit in judgment on such charges.

But prior knowledge of some of the facts of a case does not by itself establish bias. See Withrow v. Larkin, 421 U.S. at 47-50; FTC v. Cement Institute, 333 U.S. 683, 701 (1948). To protect against the possibility of actual bias from prior knowledge or personal animosities within a circuit, Congress gave review authority to the more remote and scattered members of the Judicial Conference. The Act thus cannot be said on its face to violate the due process requirement of an impartial tribunal. As for Judge Hastings' particular concerns with the composition of the Investigating Committee and its actions to date, those are not reviewable here. Judge Hastings must follow the statutory review process. See 28 U.S.C. § 372(c)(10).

This Court concludes that the Act shows a sensitivity to the procedural rights of judges under inquiry and

protects them with adequate care to satisfy the fundamental fairness required by the due process clause.

D. Other Issues

Judge Hastings contends the government's refusal to pay for his legal fees to defend against the disciplinary action diminishes his compensation in office in violation of Article III of the Constitution.[32] Congress, of course, is forbidden by the compensation clause from diminishing directly the salary of federal judges. See United States v. Will, 449 U.S. 200, 225-26 (1980). An indirect diminution of a judge's disposable income, triggered by that judge's own conduct, is entirely different. See Duplantier v. United States, 606 F.2d 654, 669 (5th Cir.

32. "The Judges ... shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office." U.S. Const., art. III, sec. 1.

1979), upholding civil penalty provisions of the Ethics in Government Act, 28 U.S.C. App. § 301 et seq., as applied to judges. This claim has no more substance than the contention of judges assigned to duties away from their homes that their compensation is diminished because their per diem allowance does not cover actual necessary expenses.[33]

Finally, upon further review of this complaint in the light of the foregoing

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33. This disposition of Judge Hastings' constitutional claim does not foreclose him from pursuing his request for legal fees with the Eleventh Circuit Judicial Council. The decision of the Director of the Administrative Office of the United States Courts on May 6, 1983, to deny his request for legal fees is not conclusive. Legislative history seems clearly to show a congressional intent to pay for attorney fees for a judge under inquiry. See H.R. Rep. 1313, 96th Cong., 2d Sess. 22 (1980). See also Memorandum of Director of Administrative Office of United States Courts to Judges, Magistrates, Circuit Executives and Clerks of Court, Dec. 30, 1980, at 4 (interpreting statute to authorize payment of attorney fees).

analysis, it is clear that the two remaining counts must also be dismissed, on the Court's own motion.[34] Count Three asks the Court to review the motives underlying Judge Godbold's order instituting the investigation. That order simply is not reviewable by this type of collateral lawsuit, see 28 U.S.C. § 372(c)(10), even if Judge Hastings seeks to clothe his request for review in the language of conspiracy. In no other respect does Count Three state a cause of action on which relief can be granted.

Count Four states on its face no Privacy Act claim in regard to past actions by the Justice Department, since

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34. These counts have not been briefed or argued by the parties. Their lack of merit is so plain that the Court believes it better expeditiously to dispose of the entire case than to leave these remaining claims dangling.

the Act requires neither that Judge Hastings be notified nor approve of any disclosures made. See 5 U.S.C. § 552a(b)(7), (e)(8). The Justice Department memorandum mentioned in paragraph 57 of the amended complaint merely states in most general terms matters already of public record. No violation of the regulations cited emerges. As for future cooperation between the Justice Department and the Investigating Committee, that has been resolved by In re Petition, 576 F. Supp. 1275 (S.D. Fla. 1983), aff'd, No. 84-5003, slip op. (11th Cir. June 20, 1984). Finally, the due process allegations against the Investigating Committee defendants in Count Four represent yet another attempt by Judge Hastings to short-circuit the exclusive review process vested by the Act in the judicial councils and the Conference, and this Court cannot

consider them. See 28 U.S.C. § 372(c)(10). Thus no cause of action is stated in Count Four.

Conclusion

For reasons stated, the Court finds that the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 withstands close constitutional scrutiny and is reasonably fashioned by Congress to improve judicial administration so as to enable the judiciary to preserve and protect its independence. The pending investigation by the Eleventh Circuit of Judge Hastings' behavior will not be enjoined. The complaint is dismissed with prejudice. An appropriate Order is filed herewith.

/s/ Gerhard A. Gesell
UNITED STATES DISTRICT JUDGE

July 25, 1984.

UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit

No. 84-5576 September Term, 1984

Honorable Alcee L. Hastings,
U.S. District Judge,
Appellant
v.

Judicial Conference of the United States, et al.

Civil Action No. 83-03850

Filed Aug. 13, 1985
George A. Fisher
Clerk

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA.

Before: EDWARDS and BORK, Circuit Judges, and McGOWAN, Senior Circuit Judge

J U D G M E N T

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED, by this Court, that the judgment of the District Court as

to appellees on Count One is vacated, and the dismissals of Count Two, Count Three and Count Four are affirmed, and the case is remanded to the District Court for entry of an order of dismissal without prejudice, in accordance with the Opinion for the Court filed herein this date.

Per Curiam
For the Court

/s/ George A. Fisher
Clerk

Date : August 13, 1985

Opinion for the Court filed by Senior Circuit Judge McGowan.

Opinion concurring in part filed by Circuit Judge Edwards.

UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit

No. 84-5576 September Term, 1985

Honorable Alcee L. Hastings,
U.S. District Judge,

CA No. 83-03850

v.

Filed Nov. 1, 1985
George A. Fisher
Clerk

Judicial Conference
of the United States

Before: EDWARDS and BORK; Circuit Judges,
McGOWAN, Senior Circuit Judge

O R D E R

Upon consideration of appellant's petition for rehearing, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam

FOR THE COURT
GEORGE A. FISHER, CLERK

BY:
/s/ Robert A. Bonner
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit

No. 84-5576 September Term, 1985

Honorable Alcee L. Hastings,
U.S. District Judge,

CA No. 83-03850

Filed Nov. 1, 1985
George A. Fisher
Clerk

v.

Judicial Conference of the United States, et al.

BEFORE: Robinson, Chief Judge; Wright, Wald, Mikva, Edwards, Ginsburg, Bork, Scalia and Starr, Circuit Judges; McGowan, Senior Circuit Judge

O R D E R

The suggestion for rehearing en banc of appellant Alcee L. Hastings has been circulated to the full Court and no member has requested the taking of a vote thereon. Upon consideration of the foregoing, it is

ORDERED, by the Court en banc, that the suggestion is denied.

Per Curiam

FOR THE COURT
GEORGE A. FISHER, CLERK

BY:
/s/ Robert A. Bonner
Chief Deputy Clerk

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

The Honorable Alcee L. Hastings, Plaintiff,	Civil Action No. 83-3850
v.	Filed July 25, 1984 James F. Davey, Clerk
Judicial Conference of the United States, et al., Defendants.	

ORDER

Upon consideration of all motions filed by the parties, the respective oppositions thereto, the arguments of counsel, and the entire record of the case, for the reasons stated in the accompanying Memorandum, it is hereby

ORDERED that the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, insofar as it authorizes and establishes procedures for the investigation and disposition of complaints relat-

ing to the conduct of Article III judges, is declared constitutional on its face; and it is further

ORDERED that plaintiff's motion for summary judgment as to Count One of the amended complaint is denied and defendants' motion for summary judgment as to Count One is granted; and it is further

ORDERED that Counts Two, Three and Four of the amended complaint are dismissed with prejudice.

/s/ Gerhard A. Gesell
UNITED STATES DISTRICT JUDGE

July 25, 1984.

CONSTITUTION OF THE UNITED STATES

Article. I.

Section. 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section. 2. * * *

[Clause 5.] The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

Section. 3. * * *

[Clause 6.] The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried the Chief

Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

[Clause 7.] Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

Section. 8. Congress shall have Power

* * *

[Clause 9.] to constitute Tribunals inferior to the Supreme Court; . . .

[Clause 18.] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers and all other Powers vested by this Constitu-

tion in the Government of the United States, or in any Department or Officer thereof.

Article. II.

Section. 1. The Executive Power shall be vested in a President of the United States of America. * * *

Section. 2. * * *

[Clause 2.] He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment

of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

* * *

Section. 4. The President, Vice President and all Civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

Article. III.

Section. 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which

shall not be diminished during their Continuance in Office.

Section. 2. The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States;--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

AMENDMENT I.

Congress shall make no law respecting an establishment of religion, or prohibit-

ing the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Public Law 96-458
96th Congress

An Act

To revise the composition of the judicial councils of the Federal judicial circuits, to establish a procedure for the processing of complaints against Federal judges, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE

Section 1. This act may be cited as the "Judicial Councils Reform and Judicial Conduct and Disability Act of 1980".

JUDICIAL COUNCILS OF THE CIRCUITS

Sec. 2.(a) Section 332(a) of title 28, United States Code, is amended to read as follows:

"(a)(1) The chief judge of each judicial circuit shall call, at least twice in each year and at such places as he may designate, a meeting of the judicial council of the circuits, consisting of --

"(A) the chief judge of the circuit, who shall preside;

"(B) that number of circuit judges fixed by majority vote of of all such judges in regular active service; and

"(C) that number of district judges of the circuit fixed by majority vote of all circuit judges in regular active service, except that --

"(i) if the number of circuit judges fixed in accordance with subparagraph (B) of this paragraph is less than six, the number of district judges fixed in accordance with this subparagraph shall be no less than two; and

"(ii) if the number of circuit judges fixed in accordance with subparagraph (B) of this paragraph is six or more, the number of district judges fixed in accordance with this subparagraph shall be no less than three.

"(2) Members of the council shall serve for terms established by a majority vote of all judges of the circuit in regular active service.

"(3) The number of circuit and district judges fixed in accordance with paragraphs (1)(B) and (1)(C) of this subsection shall be set by order of the court of appeals for the circuit no less than six months prior to a scheduled meeting of the council so constituted.

"(4) Only circuit and district judges in regular active service shall serve as members of the council.

"(5) No more than one district judge from any one district shall serve simultaneously on the council, unless at least one district judge from each district within the circuit is already serving as a member of the council.

"(6) In the event of the death, resignation, retirement, or disability of a member of the council, a replacement member shall be designated to serve the remainder of the unexpired term by the chief judge of the circuit.

"(7) Each member of the council shall attend each council meeting unless excused by the chief judge of the circuit.".

(b) Section 332(c) of title 28, United States Code, is amended by striking out "quarterly" and inserting in lieu thereof "semiannually".

(c) Section 332(d) of title 28, United States Code, is amended to read as follows:

"(d)(1) Each judicial council shall make all necessary and appropriate orders for the effective and expeditious administration of justice within its circuit. Each council is authorized to hold

hearings, to take sworn testimony, and to issue subpoenas and subpoenas duces tecum. Subpoenas and subpoenas duces tecum shall be issued by the clerk of the court of appeals, at the direction of the chief judge of the circuit or his designee and under the seal of the court, and shall be served in the manner provided in rule 45(c) of the Federal Rules of Civil Procedure for subpoenas and subpoenas duces tecum issued on behalf of the United States or an officer or agency thereof.

"(2) All judicial officers and employees of the circuit shall promptly carry into effect all orders of the judicial council.

"(3) Unless an impediment to the administration of justice is involved, regular business of the courts need not be referred to the council.".

(d)(1) The section heading for section 332 of title 28, United States Code, is amended to read as follows:

"§ 332. Judicial councils of circuits".

(2) The item relating to section 332 in the section analysis for chapter 15 of title 28, United States Code, is amended to read as follows:

"332. Judicial councils of circuits.".

PROCEDURES WITHIN JUDICIAL COUNCILS

SEC. 3.(a) Section 372 of title 28, United States Code, is amended by adding at the end thereof the following new subsection:

"(c)(1) Any person alleging that a circuit, district, or bankruptcy judge, or a magistrate, has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts, or alleging that such a judge or magistrate is unable to discharge all the

duties of office by reason of mental or physical disability, may file with the clerk of the court of appeals for the circuit a written complaint containing a brief statement of the facts constituting such conduct.

"(2) Upon receipt of a complaint filed under paragraph (1) of this subsection, the clerk shall promptly transmit such complaint to the chief judge of the circuit, or, if the conduct complained of is that of the chief judge, to that circuit judge in regular active service next senior in date of commission (hereafter, for purposes of this subsection only, included in the term 'chief judge'). The clerk shall simultaneously transmit a copy of the complaint to the judge or magistrate whose conduct is the subject of the complaint.

"(3) After expeditiously reviewing a complaint, the chief judge, by written order stating his reasons, may --

"(A) dismiss the complaint, if he finds it to be (i) not in conformity with paragraph (1) of this subsection, (ii) directly related to the merits of a decision or procedural ruling, or (iii) frivolous; or

"(B) conclude the proceeding if he finds that appropriate corrective action has been taken.

The chief judge shall transmit copies of his written order to the complainant and to the judge or magistrate whose conduct is the subject of the complaint.

"(4) If the chief judge does not enter an order under paragraph (3) of this subsection, such judge shall promptly--

"(A) appoint himself and equal numbers of circuit and district judges of the circuit to a special committee to investigate the facts and allegations contained in the complaint;

"(B) certify the complaint and any other documents pertaining thereto to each member of such committee; and

"(C) provide written notice to the complainant and the judge or magistrate whose conduct is the subject of the complaint of the action taken under this paragraph.

"(5) Each committee appointed under paragraph (4) of this subsection shall conduct an investigation as extensive as it considers necessary, and shall expeditiously file a comprehensive written

report thereon with the judicial council of the circuit. Such report shall present both the findings of the investigation and the committee's recommendations for necessary and appropriate action by the judicial council of the circuit.

"(6) Upon receipt of a report filed under paragraph (5) of this subsection, the judicial council--

"(A) may conduct any additional investigation which it considers to be necessary;

"(B) shall take such action as is appropriate to assure the effective and expeditious administration of the business of the courts within the circuit, including, but not limited to, any of the following actions:

> "(i) directing the chief judge of the district of the magistrate whose conduct is the

subject of the complaint to take such action as the judicial council considers appropriate;

"(ii) certifying disability of a judge appointed to hold office during good behavior whose conduct is the subject of the complaint, pursuant to the procedures and standards provided under subsection (b) of this section;

"(iii) requesting that any such judge appointed to hold office during good behavior voluntarily retire, with the provision that the length of service requirements under section 371 of this title shall not apply;

"(iv) ordering that, on a temporary basis for a time certain, no further cases be assigned to any judge or magistrate whose conduct is the subject of a complaint;

"(v) censuring or reprimanding such judge or magistrate by means of private communication;

"(vi) censuring or reprimanding such judge or magistrate by means of public announcement; or

"(vii) ordering such other action as it considers appropriate under the circumstances, except that (I) in no circumstances may the council order removal from office of any judge appointed to hold office during

good behavior, and (II) any removal of a magistrate shall be in accordance with section 631 of this title and any removal of a bankruptcy judge shall be in accordance with section 153 of this title; and

"(C) shall immediately provide written notice to the complainant and to such judge or magistrate of the action taken under this paragraph.

"(7)(A) In addition to the authority granted under paragraph (6) of this subsection, the judicial council may, in its discretion, refer any complaint under this subsection, together with the record of any associated proceedings and its recommendations for appropriate action, to the Judicial Conference of the United States.

"(B) In any case in which the judicial council determines, on the basis of a complaint and an investigation under this subsection, or on the basis of information otherwise available to the council, that a judge appointed to hold office during good behavior has engaged in conduct--

> "(i) which might constitute one or more grounds for impeachment under article I of the Constitution; or
>
> "(ii) which, in the interest of justice, is not amenable to resolution by the judicial council, the judicial council shall promptly certify such determination, together with any complaint and a record of any associated proceedings, to the

Judicial Conference of the United States.

"(C) A judicial council acting under authority of this paragraph shall, unless contrary to the interests of justice, immediately submit written notice to the complainant and to the judge or magistrate whose conduct is the subject of the action taken under this paragraph.

"(8) Upon referral or certification of any matter under paragraph (7) of this subsection, the Judicial Conference, after consideration of the prior proceedings and such additional investigation as it considers appropriate, shall by majority vote take such action, as described in paragraph (6)(B) of this subsection, as it considers appropriate. If the Judicial Conference concurs in the determination of the council, or makes its own determination, that consideration of impeachment

may be warranted, it shall so certify and transmit the determination and the record of proceedings to the House of Representatives for whatever action the House of Representatives considers to be necessary.

"(9)(A) In conducting any investigation under this subsection, the judicial council, or a special committee appointed under paragraph (4) of this subsection, shall have full subpoena powers as provided in section 332(d) of this title.

"(B) In conducting any investigation under this subsection, the Judicial Conference, or a standing committee appointed by the Chief Justice under section 331 of this title, shall have full subpoena powers as provided in that section.

"(10) A complainant, judge, or magistrate aggrieved by a final order of the chief judge under paragraph (3) of this

subsection may petition the judicial council for review thereof. A complainant, judge, or magistrate aggrieved by an action of the judicial council under paragraph (6) of this subsection may petition the Judicial Conference of the United States for review thereof. The Judicial Conference, or the standing committee established under section 331 of this title, may grant a petition filed by a complainant, judge, or magistrate under this paragraph. Except as expressly provided in this paragraph, all orders and determinations, including denials of petitions for review, shall be final and conclusive and shall not be judicially reviewable on appeal or otherwise.

"(11) Each judicial council and the Judicial Conference may prescribe such rules for the conduct of proceedings under this subsection, including the processing

of petitions for review, as each considers to be appropriate. Such rules shall contain provisions requiring that--

> "(A) adequate prior notice of any investigation be given in writing to the judge or magistrate whose conduct is the subject of the complaint;
>
> "(B) the judge or magistrate whose conduct is the subject of the complaint be afforded an opportunity to appear (in person or by counsel) at proceedings conducted by the investigating panel, to present oral and documentary evidence, to compel the attendance of witnesses or the production of documents, to cross-examine witnesses, and to present argument orally or in writing; and

"(C) the complainant be afforded an opportunity to appear at proceedings conducted by the investigating panel, if the panel concludes that the complainant could offer substantial information.

Any rule promulgated under this subsection shall be a matter of public record, and any such rule promulgated by a judicial council may be modified by the Judicial Conference.

"(12) No judge or magistrate whose conduct is the subject of an investigation under this subsection shall serve upon a special committee appointed under paragraph (4) of this subsection, upon a judicial council, upon the Judicial Conference, or upon the standing committee established under section 331 of this

title, until all related proceedings under this subsection have been finally terminated.

"(13) No person shall be granted the right to intervene or to appear as amicus curiae in any proceeding before a judicial council or the Judicial Conference under this subsection.

"(14) All papers, documents, and records of proceedings related to investigations conducted under this subsection shall be confidential and shall not be disclosed by any person in any proceeding unless--

> "(A) the judicial council of the circuit, the Judicial Conference of the United States, or the Senate or the House of Representatives by resolution, releases any such material which is believed necessary to an

impeachment investigation on trial of a judge under article I of the Constitution; or

"(B) authorized in writing by the judge or magistrate who is the subject to the complaint and by the chief judge of the circuit, the Chief Justice, or the chairman of the standing committee established under section 331 of this title.

"(15) Each written order to implement any action under paragraph (6)(B) of this subsection, which is issued by a judicial council, the Judicial Conference, or the standing committee established under section 331 of this title, shall be made available to the public through the appropriate clerk's office of the court of appeals for the circuit. Unless contrary

to the interests of justice, each such order issued under this paragraph shall be accompanied by written reasons therefor.

"(16) Except as expressly provided in this subsection, nothing in this subsection shall be construed to affect any other provision of this title, the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, the Federal Rules of Appellate Procedure, or the Federal Rules of Evidence.

"(17) The Court of Claims, the Court of Customs and Patent Appeals, and the Customs Court shall each prescribe rules, consistent with the foregoing provisions of this subsection, establishing procedures for the filing of complaints with respect to the conduct of any judge of such court and for the investigation and resolution of such complaints. In investigating and taking action with respect

to any such complaint, each such court shall have the powers granted to a judicial council under this subsection.".

(b) The section heading for section 372 of title 28, United States Code, is amended to read as follows:

"§ 372. Retirement for disability; substitute judge on failure to retire; judicial discipline.".

(c) The item relating to section 372 in the section analysis for chapter 17 of title 28, United States Code, is amended to read as follows:

"372. Retirement for disability; substitute judge on failure to retire; judicial discipline.".

AUTHORITY OF THE JUDICIAL CONFERENCE

SEC. 4. The fourth undesignated paragraph of section 331 of title 28, United States Code, is amended to read as follows:

"The Conference shall make a comprehensive survey of the condition of business in the courts of the United States and prepare plans for assignment of judges to or from circuits or districts where necessary. It shall also submit suggestions and recommendations to the various courts to promote uniformity of management procedures and the expeditious conduct of court business. The Conference is authorized to exercise the authority provided in section 372(c) of this title as the Conference, or through a standing committee. If the Conference elects to establish a standing committee, it shall be appointed by the Chief Justice and all petitions for review shall be reviewed by that committee. The Conference or the standing committee may hold hearings, take sworn testimony, issue subpoenas and subpoenas duces tecum, and

make necessary and appropriate orders in the exercise of its authority. Subpoenas and subpoenas duces tecum shall be issued by the clerk of the Supreme Court or by the clerk of any court of appeals, at the direction of the Chief Justice or his designee and under the seal of the court, and shall be served in the manner provided in rule 45(c) of the Federal Rules of Civil Procedure for subpoenas and subpoenas duces tecum issued on behalf of the United States or an officer or any agency thereof. The Conference may also prescribe and modify rules for the exercise of the authority provided in section 372(c) of this title. All judicial officers and employees of the United States shall promptly carry into effect all orders of the Judicial Conference or the standing committee established pursuant to this section.".

ADMINISTRATIVE OFFICE OF UNITED STATES COURTS

SEC. 5. Section 604 of title 28, United States Code, is amended by adding at the end the following new subsection:

"(h)(1) The Director shall, out of funds appropriated for the operation and maintenance of the courts, provide facilities and pay necessary expenses incurred by the judicial councils of the circuits and the Judicial Conference under section 372 of this title, including mileage allowance and witness fees, at the same rate as provided in section 1821 of this title. Administrative and professional assistance from the Administrative Office of the United States Courts may be requested by each judicial council and the Judicial Conference for purposes of discharging their duties under section 372 of this title.

"(2) The Director of the Administrative Office of the United States Courts shall include in his annual report filed with the Congress under this section a summary of the number of complaints filed with each judicial council under section 372(c) of this title, indicating the general nature of such complaints and the disposition of those complaints in which action has been taken.".

AUTHORIZATION OF APPROPRIATIONS

SEC. 6. There are authorized to be appropriated such sums as may be necessary to carry out the provisions of this Act.

EFFECTIVE DATE

SEC. 7. This Act shall become effective on October 1, 1981.

RULES OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

* * *

ADDENDUM THREE

RULE FOR THE CONDUCT OF COMPLAINT PROCEEDINGS UNDER 28 U.S.C.A. § 372(a)

Preface: Pursuant to 28 U.S.C.A. § 372(c)(11) the following rule is prescribed by the judicial council for the conduct of proceedings under § 28 U.S.C.A. § 372(c).

1. Any person alleging that a circuit, district or bankruptcy judge or a magistrate of this circuit has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts, or alleging that such a judge or magistrate is unable to discharge all of the duties of office by reason of mental or physical disability, may file with the clerk of the court of appeals

(hereinafter "the clerk") a written and signed complaint verified under oath or affirmation, containing a brief statement of the facts alleged to constitute such conduct. Anonymous complaints shall not be accepted. The complaint should be filed in a sealed envelope marked on the outside "Complaint of Judicial Misconduct filed by (name of complaining person)." No identification of the judge or magistrate whose conduct is the subject of the complaint shall appear on the outside of the envelope. If the clerk receives a complaint not sealed or not properly marked he shall seal and properly mark it.

2. Upon receipt of a complaint filed under ¶1 the clerk shall promptly transmit to the chief judge of the circuit, or, if the conduct complained of is that of the chief judge, to the circuit judge in regular active service next senior in date

of commission (hereafter included in the term "chief judge"). The clerk shall after unsealing the complaint, simultaneously transmit a copy of the complaint to the judge or magistrate whose conduct is the subject of the complaint, and reseal it.

3. After expeditiously reviewing the complaint, the chief judge, by written order stating his reasons, may:

(a) dismiss the complaint, if he finds it to be:

(i) not in conformity with ¶1, or

(ii) directly related to the merits of a decision or procedural ruling, or

(iii) frivolous; or

(b) conclude the proceeding if he finds that appropriate corrective action has been taken.

(c) refer the complaint to a screening panel appointed by him consisting of one circuit judge and one district judge for review and recommendation.

(d) in connection with the review and the determinations that may be made by him under this paragraph, the chief judge is authorized to require that information be furnished to him in writing by the complaining person, the judge or magistrate whose conduct is the subject of the complaint, and any

other persons or entities of the United States courts that he considers appropriate.

The chief judge shall transmit copies of his written order to the complainant and to the judge or magistrate whose conduct is the subject of the complaint.

4. If the chief judge does not enter an order under ¶3, he shall promptly:

(a) appoint himself and equal numbers of circuit and district judges of the circuit to a special committee to investigate the facts and allegations contained in the complaint;

(b) designate a bankruptcy judge or magistrate, as the case may be, to join the committee in an advisory capacity when

a bankruptcy judge or magistrate is the subject of the complaint;

(c) certify the complaint and any other documents pertaining thereto to each member of the committee; and

(d) provide written notice to the complainant and the judge or magistrate whose conduct is the subject of the complaint of the action taken under this paragraph.

5. (a) Each committee appointed under ¶4 shall conduct an investigation as extensive as it considers necessary and shall expeditiously file a comprehensive written report thereon with the judicial council. The report shall present the findings of the

investigation and the committee's recommendations for necessary and appropriate action by the judicial council.

(b) Adequate prior notice of any investigation under ¶5(a) shall be given in writing to the judge or magistrate whose conduct is the subject of the complaint, and such judge or magistrate shall be afforded an opportunity to appear (in person or by counsel) at proceedings conducted by the committee, to present oral and documentary evidence, to compel the attendance of witnesses or the production of documents, to cross-examine witnesses, and to present argument orally or in writ-

ing. The complainant shall be afforded an opportunity to appear at proceedings conducted by the committee, if it concludes that the complainant could offer substantial information.

6. Upon receipt of a report filed under ¶5 the judicial council may:

(a) conduct any additional investigation that it considers necessary;

(b) take such action as appropriate to assure the effective and expeditious administration of the business of the courts within the circuit, including, but not limited to, any of the following:

(i) directing the chief judge of the district of the judge or magistrate whose conduct is the subject of the com-

plaint to take such action as the judicial council considers appropriate;

(ii) certifying disability of a judge appointed to hold office during good behavior whose conduct is the subject of the complaint, pursuant to the procedures and standards provided under 28 U.S.C.A. § 372(b);

(iii) requesting that any such judge appointed to hold office during good behavior voluntarily retire, with provision that the length of service requirements under 28 U.S.C.A § 371 shall not apply;

(iv) ordering that, on a temporary basis for a time certain, no further cases be assigned to the judge or magistrate whose conduct is the subject of the complaint;

(v) censuring or reprimanding the judge or magistrate by means of private communication;

(vi) censuring or reprimanding the judge or magistrate by means of public announcement; or

(vii) ordering such other action as it considers appropriate under the circumstances, except that:

(I) in no circumstances may the judicial council order removal from office of any judge appointed to hold office during good behavior, and

(II) any removal of a magistrate shall be in accordance with Title 28 U.S.C.A. § 631, and any removal of a bankruptcy judge shall be in accordance with 28 U.S.C.A. § 153;

(c) The judicial council shall immediately provide written notice to the complainant and to the judge or magistrate of the action taken under this paragraph.

(d) Each written order to implement any action under this paragraph that is issued by the judicial council shall be made available to the public upon request through the office of the clerk. Unless contrary to the interests of justice, each such order issued under this paragraph shall be accompanied by written reasons therefor.

7. (a) In addition to the authority granted under ¶6, the judicial council may in its discretion refer any complaint made under § 372(c), together with the record of any associated proceedings and its recommendations for appropriate action, to the Judicial Conference of the United States.

(b) In any case in which the judicial council determines, on the basis of a complaint and an investigation under § 372(a), or on the basis of information otherwise available to it, that a judge appointed to hold office during good behavior has engaged in conduct:

(i) that might constitute one or more grounds for impeachment under Article I of the Constitution; or (ii) that in the interests of justice is not amenable to resolution by the judicial council, the judicial council shall promptly certify such determination, together with any complaint and a record of any associated proceed-

ings, to the Judicial Conference of the United States.

(c) The judicial council shall, unless contrary to the interests of justice, immediately submit written notice to the complainant and to the judge or magistrate whose conduct is the subject of the action taken under this paragraph.

8. A complainant, judge, or magistrate aggrieved by a final order of the chief judge under ¶3 may, within 30 days of the date of the order, petition the judicial council for review thereof. The council shall grant or deny the petition for review by a majority vote. A complainant, judge, or magistrate aggrieved by an action of the judicial council under

¶6 may, within 30 days from the date of the action, petition the Judicial Conference of the United States for review thereof.

9. No judge or magistrate whose conduct is the subject of an investigation shall serve upon a special committee appointed under ¶4, or upon the judicial council, until all related proceedings under § 372(c) have been finally terminated.

10. No person shall be granted the right to intervene or to appear as amicus curiae in any proceeding before the judicial council.

11. In conducting any investigations under § 372(c) the judicial council and any special committees appointed under ¶4 shall have full subpoena powers as provided in 28 U.S.C.A. §332. Subpoenas

shall be enforced as provided in Rule 45(f), Fed. Rules of Civil Procedure.

12. All papers, documents, and records of proceedings related to investigations conducted under § 372(c) shall be confidential and shall not be disclosed by any person in any proceeding unless:

(a) the judicial council, the Judicial Conference of the United States, or the Senate or the House of Representatives by resolution, releases any such material that is believed necessary to an impeachment investigation or trial of a judge under Article I of the Constitution; or

(b) authorized in writing by the judge or magistrate who is the subject of the complaint and by the chief judge, the Chief Justice of the United States, or the

chairman of the standing committee established under 28 U.S.C.A. § 331.

13. The clerk shall maintain files for the papers, documents, and records arising from proceedings taken pursuant to § 372(c), separate and apart from all other files and records. These files, except for public records, shall be maintained with appropriate security precautions.

14. The effective date of this rule is October 1, 1981. Complaints filed with the clerk or the chief judge of the Fifth Circuit before October 1, 1981 complaining of actions of a judge or a magistrate now in this circuit shall be processed and handled by this circuit as provided by resolutions of the judicial council of the Fifth Circuit in effect September 30, 1981.

No. 85-1301 (3)

Supreme Court, U.S.
FILED
MAY 3 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

THE HONORABLE ALCEE L. HASTINGS,
UNITED STATES DISTRICT JUDGE,

Petitioner,

—v.—

THE JUDICIAL CONFERENCE OF THE UNITED STATES, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF OF RESPONDENTS HON. JOHN C. GODBOLD, CHIEF JUSTICE OF THE ELEVENTH CIRCUIT; HON. GERALD B. TJOFLAT, CIRCUIT JUDGE; HON. FRANK M. JOHNSON, JR., CIRCUIT JUDGE; HON. SAM C. POINTER, JR., CHIEF JUDGE, NORTHERN DISTRICT OF ALABAMA, AND HON. WILLIAM C. O'KELLEY, DISTRICT JUDGE, NORTHERN DISTRICT OF GEORGIA, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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10/P

QUESTIONS PRESENTED

1. Whether the Court of Appeals was correct in applying the ripeness doctrine to defer ruling on the constitutionality of the Judicial Council's Reform and Judicial Conduct and Disability Act of 1980 (the "Act") in view of the fact that at the time of its decision, all that the Investigating Committee had done was to conduct a fact gathering investigation.

2. Whether the Court should reach the merits of the constitutionality of the Investigating Committee's statutory power to investigate, hold proceedings and issue subpoenas in view of the fact that the Court of Appeals for the Eleventh Circuit has considered this question, has issued an opinion and the appellant has sought a writ of certiorari in that case.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-1301

THE HONORABLE ALCEE L. HASTINGS,
UNITED STATES DISTRICT JUDGE,

Petitioner,

—v.—

THE JUDICIAL CONFERENCE OF THE UNITED STATES, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents, Hon. John C. Godbold, Chief Justice of the Eleventh Circuit; Hon. Gerald B. Tjoflat, Circuit Judge; Hon. Frank M. Johnson, Jr., Circuit Judge; Hon. Sam C. Pointer, Jr., Chief Judge for the Northern District of Alabama; and Hon. William C. O'Kelley, District Judge for the Northern District of Georgia, members of the Investigating Committee of the Judicial Council of the Eleventh Circuit (the "Investigating Committee") respectfully request that this Court deny the Petition for Writ of Certiorari, seeking review of the opinion of the United States Court of Appeals for the District of Columbia in this case. That opinion is reported in *Hastings v. Judicial Conference of the United States*, 770 F.2d 1093.

STATEMENT OF THE CASE

On December 23, 1983, Judge Hastings brought an action in the United States District Court for the District of Columbia against the Judicial Conference of the United States, the Chief Justice of the United States in his official capacity as presiding officer of the Conference; the Standing Committee of the Judicial Conference;[1] the Judicial Council of the Eleventh Circuit; the Chief Judge of the Eleventh Circuit, John C. Godbold; the members of the Investigating Committee, Judges Godbold, Tjoflat, Johnson, Pointer and O'Kelley;[2] and, in Count Four, the Attorney General of the United States, William French Smith.

The action sought a declaration that the Act is void and an injunction against continuation of the proceedings taken against Judge Hastings pursuant to the Act. Judge Hastings' complaint contained four counts. The first count challenged the facial constitutionality of the Act on separation of powers and due process grounds. The second count attacked the constitutionality of the Act as applied to Judge Hastings. The third count alleged that the complaint filed against Judge Hastings and the proceedings thereafter initiated, were the product of a conspiracy to violate his constitutional rights. The fourth count alleged a violation of appellant's rights under the Privacy Act, 5 U.S.C. § 552a (1982).

The issues came before the District Court on cross motions for partial summary judgment along with the defendants' motion for judgment on the pleadings as to certain counts on

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1 The Conference has named a Standing Committee as authorized by the Act to exercise the power of the Conference over judicial conduct matters. See 28 U.S.C. §§ 331, 372(c)(10), (12), (14), (15). This committee is known as the Committee to Review Circuit Council Conduct and Disability Orders.

2 Judges in the Eleventh Circuit named as defendants and that Circuit's Judicial Council waived objections to venue.

grounds of ripeness and subject matter jurisdiction. On July 25, 1984, the District Court issued its Memorandum Opinion. (App. 85). The District Court denied defendants' motion seeking dismissal on ripeness grounds and proceeded to address the merits of the issues raised by the cross-motion for summary judgment. It rejected Judge Hastings' facial attack under Count One of the Complaint on the constitutionality of the Act. In so upholding the facial validity of the Act, the District Court held that the Act did not pose a threat to the independence of the judiciary, that the judiciary's discharge of its tasks under the Act did not violate the separation of powers doctrine and that the Act complied with due process. As to Count Two of the Complaint, the District Court held that it had no jurisdiction over Judge Hastings' Count Two claims concerning the present and possible future application of the Act to him. The Court pointed out that the Act provides that "all orders and determinations, including denials of petitions for review, shall be final and conclusive and shall not be judicially reviewable on appeal or otherwise", 28 U.S.C. § 372(c)(10). It ruled that the language of the Act and its legislative history plainly showed that Congress intended to establish an absolute bar against judges under inquiry seeking judicial review of actions taken against them pursuant to the Act. Accordingly, the District Court dismissed Count Two. It also dismissed Counts Three and Four of the Complaint.

On August 23, 1984, Judge Hastings timely noticed an appeal from the District Court's order of dismissal.

On August 13, 1985, the Court of Appeals issued its opinion holding that at the time the District Court rendered its decision, adjudication of Counts One and Two was premature. It therefore vacated the District Court's grant of summary judgment to respondents on Count One and affirmed the District Court's dismissal of Count Two. The Court also affirmed the District Court's dismissal of Counts Three and Four, although, as with Count Two, for different reasons.

Judge Hastings applied for a rehearing and for a hearing *en banc*. His application was denied.

(a) Statement of Facts

On December 29, 1981, Judge Hastings and William A. Borders, Jr. were charged, in an indictment returned by a grand jury in the Southern District of Florida, with conspiring to solicit and accept a bribe in exchange for influencing the outcome of a case pending before Judge Hastings. Borders' trial was severed and transferred to the Northern District of Georgia. On May 7, 1982, Borders was convicted after trial by jury. On February 6, 1983, Judge Hastings was acquitted by a jury in the Southern District of Florida.

On March 17, 1983, Wm. Terrell Hodges, Chief Judge of the Middle District of Florida and Anthony A. Alaimo, Chief Judge of the Southern District of Georgia, filed a verified written complaint with the Clerk of the United States Court of Appeals for the Eleventh Circuit, pursuant to the Act and the Rule for the conduct of Complaint Proceedings under 28 U.S.C. § 372(c), as promulgated by the Judicial Council of the Eleventh Circuit. The complaint alleged that Judge Hastings had engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts and had violated several canons of the Code of Judicial Conduct for United States Judges.

The complaining judges alleged that:

(1) Judge Hastings had conspired with Borders to obtain a bribe in return for an official judicial act;

(2) Judge Hastings made "public and unfounded statements" that the United States was prosecuting him on racial/political grounds;

(3) Judge Hastings knowingly and publicly exploited his judicial position or acquiesced in such exploitation by others acting on his behalf by accepting financial donations from lawyers and other members of the public to defray the costs of his criminal defense;

(4) Judge Hastings, by his own testimony, had allowed *ex parte* contacts between his law clerks and counsel in

pending cases concerning substantive issues in those cases and concerning the content of orders and opinions not yet entered, and had "completely abdicated and delegated" his judicial decision-making authority to his law clerks;

(5) Judge Hastings, by his own testimony, had told counsel in a judicial proceeding that he had read an important precedent when he knew he had not and explained his deception by implying that it was common for judges to make such deliberate misstatements;

(6) Judge Hastings, by his own testimony, had exploited his judicial position by soliciting funds for someone he knew was a convicted federal offender.

The Complainants requested that the Chief Judge of the Eleventh Circuit together with any committee he may appoint pursuant to 28 U.S.C. § 372(c), the Judicial Council of the Eleventh Circuit, and the Judicial Conference of the United States make such investigations, conduct such hearings or other proceedings, and make such orders as shall be necessary to vindicate the honor of United States Judges and to discipline Judge Hastings for his odious behavior. The Complainants asked that the disciplinary measures include, but not be limited to, the making of a recommendation to the House of Representatives that Judge Hastings be impeached according to the Constitution and laws of the United States.

On March 29, 1983, John C. Godbold, Chief Judge of the United States Court of Appeals for the Eleventh Circuit, entered an order appointing an investigating committee to investigate the facts and allegations contained in the complaint. The members of the Investigating Committee are Judge Godbold; Gerald B. Tjoflat, Circuit Judge; Frank M. Johnson, Jr., Circuit Judge; Sam C. Pointer, Jr., Chief Judge of the Northern District of Alabama; and William C. O'Kelley, District Judge of the Northern District of Georgia. The Investigating Committee is statutorily empowered and required to "conduct an investigation as extensive as it considers necessary, and [to] expeditiously file a comprehensive written report

therein with the judicial council of the circuit." It is required to present both the findings of the investigation and the Investigating Committee's recommendations for necessary and appropriate action. 28 U.S.C. § 372(c) (5).

(b) The Investigation Conducted by the Investigating Committee

On June 3, 1983, the Investigating Committee began its investigation with the filing of a petition in the Southern District of Florida for access to the materials of the grand jury that had indicted Judge Hastings and William Borders as co-conspirators. The Investigating Committee had determined that it needed the materials in order to perform its statutory duty to make a complete and thorough investigation. The petition did not seek public disclosure of the materials.

On June 16, 1983, Judge Hastings appeared and filed in the public file of the District Court an answer and certain affirmative defenses. He attached as part of an appendix a copy of the complaint against him which had led to the appointment of the Investigating Committee and which theretofore had been confidential. Only the fact that a complaint had been filed, and an investigating committee appointed, had been theretofore disclosed by Judge Godbold.

All of the District Judges for the Southern District of Florida recused themselves from presiding over the matter. On December 19, 1983, United States District Judge Eugene A. Gordon, a specially designated United States District Judge from the Fourth Circuit entered an order granting the petition.

In its opinion, the District Court held that an investigating committee had the power to petition for access to grand jury materials. *In re Petition to Inspect and Copy Grand Jury Materials*, 576 F.Supp. 1275 (S.D. Fla. 1983).

On December 29, 1983, Judge Hastings filed a Notice of Appeal. On February 3, 1984, a special panel of the Court of Appeals stayed the District Court's order and expedited the appeal.

On June 30, 1984, the order granting the petition was affirmed. *In re Petition to Inspect and Copy Grand Jury Materials*, 735 F.2d 1261 (11th Cir. 1984). The Court of Appeals supported the District Court's analysis in the special circumstances of a judicial investigation under section 372(c) of the Act.

On August 24, 1984, Judge Hastings petitioned the Supreme Court for a writ of certiorari. On October 9, 1984, the Supreme Court entered an order denying the petition for a writ of certiorari.

On October 16, 1984, Judge Hastings petitioned the Supreme Court for a rehearing. On November 5, 1984, the Supreme Court entered an order denying the petition for rehearing.

On December 23, 1983, Judge Hastings brought this action in the United States District Court for the District of Columbia. The District Court, per the Hon. Gerhard A. Gesell, held that it did have the power to review the constitutionality of the Act itself. But first, the District Court rejected the defendant's claims that the only issue ripe for review was whether it is constitutional for judges to investigate judges for conduct alleged to prejudice the effective and efficient administration of the courts.

Judge Gesell found that the 1980 Act represented a legitimate exercise of Congress' "necessary and proper" power by which Congress gave the courts reasonable means to put the judiciary's own house in order.

Judge Gesell also held that the Act's provision for recommending impeachment to the House of Representatives did nothing to impinge on the exclusive power of Congress over impeachment.

Finally, Judge Gesell held that although impeachment might be the sole means of removing an Article III judge from office, it did not follow that other forms of discipline that did not remove a judge from office were foreclosed.

Judge Gesell also rejected Judge Hastings' vagueness claims. Judge Gesell rejected Judge Hastings' due process claims as well, holding that the Act expressly provides a judge under inquiry with, among other rights, the opportunity to appear before the investigating committee, present evidence and compel its production if necessary, as well as to cross-examine witnesses. 28 U.S.C. § 372(c) (10).

As for Judge Hastings' contention that the Act impermissibly combines investigative and adjudicatory power, so as to render impossible a fair adjudication, the District Court held that the mere combination of such powers, by itself, does not violate due process, citing *Withrow v. Larkin*, 421 U.S. 35, 58 (1975).

As for Judge Hastings' particular concerns with the composition of the Investigating Committee and its actions to date, the District Court held that those were not reviewable and required Judge Hastings to follow the statutory review process. *See* 28 U.S.C. § 372(c) (10). Finally, the District Court held that it had no power to review the motives underlying Judge Godbold's order instituting the investigation. It held that 28 U.S.C. § 372 (c) (10) did not permit review of that order by Judge Hastings' collateral lawsuit.

Judge Hastings appealed. On August 13, 1985, the Court of Appeals held that at the time the District Court rendered its decision, adjudication of the constitutional issues was premature. The Court of Appeals pointed out that Count One of Appellant's complaint touched matters of profound importance for the federal judicial system, and the Court of Appeals recognized that as to each of the investigatory and disciplinary powers conferred by the Act, there may be a question of whether Congress may lawfully vest such power in an administrative organ of the federal judiciary composed of Article III judges. However, the Court of Appeals held that such a question may be answered only in an appropriate adjudicatory setting. On the basis of the record before it, the court pointed out that all that had happened was that an investigation under

the Act had begun. The court held, emphasizing the principle of constitutional avoidance, that under the circumstances the constitutional issues were not ripe for decision.

Since the decision of the Court of the Appeals for the District of Columbia, the issue of the constitutionality of the Act came before the Court of Appeals for the Eleventh Circuit. *In re Certain Complaints Under Investigation by an Investigating Committee of the Judicial Council of the Eleventh Circuit*, 783 F.2d 1488. The facts relating to this case are discussed next.

The Investigating Committee conducted, pursuant to the Act, proceedings in Atlanta, Georgia convening on May 20, 1985. A number of witnesses were subpoenaed to appear before the Investigating Committee. Certain witnesses declined to appear or, in some cases, appeared but declined to answer certain questions about what occurred in Judge Hastings chambers. Thus, Betty Ann Williams, Judge Hastings secretary was subpoenaed to appear and bring with her certain specified records maintained in Judge Hastings' chambers. She declined to appear. Several of Judge Hastings' present or former law clerks were subpoenaed to appear and give testimony. One clerk declined to appear. Two other clerks chose not to answer any questions about what occurred in Judge Hastings' chambers while they were employed as law clerks.

With respect to the witnesses who refused to appear or who appeared and refused to answer certain questions, the Investigating Committee filed appropriate motions with the Court of Appeals to compel their testimony. In turn Judge Hastings and the witnesses opposed the application and two of the witnesses and Judge Hastings also sought to enjoin the proceedings in the District Court.

On May 20, 1985, Betty Ann Williams and Alan Ehrlich, as members of the official staff of Judge Hastings, and Judge Hastings filed a complaint for injunctive and other relief in the United States District Court for the Southern District of Florida. The complaint named as defendants Spencer Mercer, the Clerk of the Eleventh Circuit, and the five judges who are

members of the Investigating Committee. By this civil action, the plaintiffs sought to challenge the validity and enforceability of the subpoenas issued under the seal of the Court of Appeals for the Eleventh Circuit at the request of the Investigating Committee. The plaintiffs moved for preliminary relief against the subpoenas, and the defendant members of the Investigating Committee filed a motion to dismiss the complaint for want of subject matter jurisdiction. On May 24, 1985, a hearing was held on the pending motions before United States District Judge William W. Wilkins, Jr. of the District of South Carolina, sitting by special designation. Following the hearing, Judge Wilkins filed a Memorandum Opinion dated May 24, 1985, in which he concluded that the District Court lacked jurisdiction over subpoenas issued by the Court of Appeals and ordered dismissal of the action. In the alternative, Judge Wilkins also considered the substance of the plaintiffs' claims and found the claims to be "without merit" because the subpoenas "are . . . valid and enforceable." *Williams v. Mercer*, 610 F. Supp. 169 (D.C. Fla. 1985) at p. 170-171. Accordingly, Judge Wilkins ordered dismissal of plaintiffs' complaint. Plaintiffs' notice of appeal followed immediately after entry of Judge Wilkins' Memorandum Opinion.

The enforcement applications then pending and Judge Hastings' appeal came on for hearing and oral argument on June 17, 1985, before the same panel of Court of Appeals judges who heard the grand jury records appeal. On September 5, 1985, the Court of Appeals for the Eleventh Circuit directed the parties to file and serve supplemental briefs on certain specific issues by 5:00 P.M. September 23, 1985. The issues were the following:

> (1) In light of the recent opinion of the Court of Appeals for the District of Columbia Circuit in *Hastings v. Judicial Conference*, No. 84-5576 (August 13, 1985), the nature and scope of the constitutional issues the court would need to determine before it could enforce the Investigating Committee's subpoenas to the witnesses in the instant case;

(2) In light of the opinion of the Court of Appeals for the District of Columbia Circuit in *Hastings*, *supra*, at p. 18, whether it has now become more appropriate for the court to reach the constitutional issues, and if so, what constitutional issues the court should address at this time;

(3) Whether the court should decline to address the constitutional issues for reasons stated in the opinion of the Court of Appeals for the District of Columbia Circuit in *Hastings*, *supra*, (e.g., remoteness), or for any other constitutional issues the court should not address at this time.

On February 20, 1986, the Court of Appeals for the Eleventh Circuit held that: (1) it had exclusive original jurisdiction to determine motions to enforce or quash the subpoenas; (2) the Investigating Committee's issuance and service of the subpoenas did not violate the Constitution; and (3) the subpoenas were enforceable despite invocation of a privilege protecting communications between Judge and his staff.

In its opinion the Court of Appeals pointed out that courts of appeals cannot be deemed powerless to protect the integrity of their process, and that the Act's goals of maintaining public confidence in the judiciary and promoting the effective administration of justice require that investigations into alleged judicial misconduct be concluded as expeditiously as is reasonably possible, lest a sitting Article III judge be compelled to function under a cloud of doubt and suspicion for any longer than is absolutely necessary.

As to the existense, and investigative authority of the Investigating Committee, the Court of Appeals held that the Act did not impermissibly assign executive power, including the subpoena power, to judicial officers because investigating committees are concerned solely with matters affecting the management and reputation of the judiciary itself.

The Court of Appeals also held that the investigatory scheme established by the Act did not unconstitutionally in-

trude upon the independence of a sitting Article III judge. The Court of Appeals based its conclusion on a finding that the complaint procedure is reasonable and not overly threatening to judicial independence.

The Court of Appeals also held that the authority given to the judicial branch to certify that grounds for impeachment may exist is not inconsistent with the sole power of the House of Representatives to initiate impeachment proceedings. The Court of Appeals reasoned that the Constitution's impeachment provisions do not require that the House itself perform all preliminary investigatory functions that ultimately may inform its decision whether or not to impeach.

As to the claims of a privilege protecting communications among Judge Hastings and members of his staff, the Court of Appeals reasoned that the members of Judge Hastings' staff had only a qualified privilege because "[l]ike any testimonial privilege, the judicial privilege must be harmonized with the principle that ' "the public . . . has a right to every man's evidence." ' *United States v. Bryan*, 339 U.S. 323, 331 (1950)." The Court of Appeals held that the Investigating Committee was required to and did meet the burden of showing "the importance of the inquiry for which the privileged information is sought; the relevance of that information to its inquiry; and the difficulty of obtaining the desired information through alternative means."

The Court of Appeals then weighed the Investigating Committee's demonstrated need for the information against the degree of intrusion upon the confidentiality of privileged communications necessary to satisfy that need and concluded that the judicial privilege was overridden by the Investigating Committee's need for the testimony of the law clerks to further its investigation.

REASONS FOR DENYING THE WRIT

1. The decision of the Court of Appeals that the case was not ripe for adjudication is consistent with the prior decisions of this Court and not in conflict with the decision of any other Federal Court of Appeals.

It is well established that constitutional issues affecting legislation will not be determined in advance of the necessity of deciding them and that in the absence of a case where the underlying constitutional issues are in clean cut and concrete form, the court will not consider them.

In this case, at the time of the District Court's decision, the concrete facts were that (a) a complaint had been filed under the Act, (b) a special committee had been designated to investigate the complaint as extensive as it considered necessary, and (c) a fact gathering investigation had begun. It was at that stage of the proceedings that Judge Hastings asked the District Court to pass on the constitutionality of the entire Act of Congress that vested in the Judicial Councils a number of powers, none of which had yet to be invoked against him.

With respect to the fact gathering aspect of the investigation, the Court of Appeals declined to render judgment on the investigation itself while in progress. The Court of Appeals likened this investigation to ongoing administrative proceedings where courts are loath to interfere except in unusual circumstances.

The Court declined to find such unusual circumstances, i.e. irreparable injury, because no sanction had been imposed (Judge Hastings had not been subpoenaed to testify) and because Judge Hastings had available his constitutional challenge to the validity of the Act in every one of the situations in which he might be exposed to the threat of injury. The Court of Appeals pointed out that Judge Hastings could impose his constitutional arguments as a defense to a subpoena, or a ground for review by a Judicial Council or the Judicial Con-

ference determination, and in a lawsuit brought when injury is significantly more immediate and concrete than now.

With respect to the expenditure of legal fees, this Court has held in *F.T.C. v. Standard Oil Co. of California*, 449 U.S. 232 (1980), that the expense and disruption in defending oneself, even if substantial, does not constitute irreparable injury to a respondent before the F.T.C. Furthermore, while Judge Hastings has expended legal effort in opposing the Investigating Committee's investigation, he has chosen to boycott the proceedings since the Investigating Committee began its investigation.

Petitioner also complains of a so-called intercircuit shell game but it was petitioner himself that forum shopped in the District of Columbia. The fact that the petitioner's suit is in the District of Columbia suggests another reason for not reviewing the decision below. It makes for sound judicial administration to allow the Court of Appeals in the Eleventh Circuit to take the lead in considering the constitutional issues, if any, raised by the Act with respect to a proceeding pending in the Eleventh Circuit.

2. The Decision of the Court of Appeals for the Eleventh Circuit is a further reason why this Court should not grant the Petitioner's application for a Writ of Certiorari.

The Court of Appeals for the Eleventh Circuit, in a carefully reasoned and detailed opinion, has considered a number of petitioner's constitutional claims and has rejected them. On March 28, 1986, the petitioner sought a writ of certiorari in that case, and, while the respondents will urge that there is no basis for granting a writ in that case, if a writ is granted, that is the case when it should be done. In that case the Court of Appeals had the benefit of a full analysis of concrete issues which arose in a contested situation.

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be denied.

Dated: May 2, 1986
New York, New York

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Nos. 85-1301 and 85-1609

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In the Supreme Court of the United States

OCTOBER TERM, 1985

THE HONORABLE ALCEE L. HASTINGS,
UNITED STATES DISTRICT JUDGE, PETITIONER

v.

JUDICIAL CONFERENCE OF THE UNITED STATES, ET AL.

THE HONORABLE ALCEE L. HASTINGS,
UNITED STATES DISTRICT JUDGE, ET AL., PETITIONERS

v.

THE HONORABLE JOHN C. GODBOLD,
CHIEF JUDGE OF THE UNITED STATES COURT
OF APPEALS FOR THE ELEVENTH CIRCUIT, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT AND THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, which authorizes committees of Article III judges to investigate complaints against other judicial officers, violates the separation of powers doctrine by encroaching upon the independence of the judiciary.

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In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-1301

THE HONORABLE ALCEE L. HASTINGS,
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v.

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THE HONORABLE JOHN C. GODBOLD,
CHIEF JUDGE OF THE UNITED STATES COURT
OF APPEALS FOR THE ELEVENTH CIRCUIT, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT AND THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION[1]

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit (85-1301 Pet. App. 1-84) is

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[1]This brief presents the views of the federal respondents in No. 85-1301 other than the five members of the Investigating Committee of the Eleventh Circuit (see note 7, *infra*), who are filing a brief on their own behalf. It presents the views of the United States in No. 85-1609; the United States intervened in the Eleventh Circuit to defend the constitutionality of the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980.

reported at 770 F.2d 1093. The opinion of the United States District Court for the District of Columbia (85-1301 Pet. App. 85-144) is reported at 593 F. Supp. 1371. The opinion of the United States Court of Appeals for the Eleventh Circuit (85-1609 Pet. App. 1-169) is reported at 783 F.2d 1488. The order of the United States District Court for the Southern District of Florida (85-1609 Pet. App. 170-178) is reported at 610 F. Supp. 169.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on August 13, 1985. A petition for rehearing with suggestion of rehearing en banc was denied on November 1, 1985 (85-1301 Pet. App. 148-149). The petition for a writ of certiorari in No. 85-1301 was filed on January 30, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on February 20, 1986. The petition for a writ of certiorari in No. 85-1609 was filed on March 28, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 1651(a).

STATEMENT

1. Congress enacted the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 to provide a means by which the federal judiciary may exercise supervisory control over its own members. Congress believed that the new system, which in large part mirrored that previously adopted by the Judicial Conference of the United States and various circuit councils,[2] would enable Article III

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[2]See *Judicial Tenure and Discipline—1979-1980: Hearings Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 96th Cong, lst & 2d Sess. 63 (1979-1980) [hereinafter cited as *Judicial Tenure and Discipline*].

judges to "put their own house in order" (*Chandler* v. *Judicial Council*, 398 U.S. 74, 85 (1970)), and thereby reinforce the integrity of the judicial system.

Under the Act, any person may file a complaint with the clerk of a court of appeals, alleging that a circuit judge, a district judge, a bankruptcy judge, or a magistrate in the circuit either has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts or "is unable to discharge all the duties of office by reason of mental or physical disability" (28 U.S.C. 372(c)(1)). When a complaint is received, if the chief judge of the circuit finds that the complaint is "frivolous," that it is "directly related to the merits of a decision or procedural ruling," or that the matter prompting the complaint has already been resolved, he may issue a written order terminating the proceeding (28 U.S.C. 372(c)(3)). Otherwise the chief judge is directed to empanel a special committee, composed of "himself and equal numbers of circuit and district judges of the circuit," to conduct an investigation into the matters raised in the complaint (28 U.S.C. 372(c)(4)). The committee is empowered to "conduct an investigation as extensive as it considers necessary" (28 U.S.C. 372(c)(5)), and the Act grants "full subpoena powers" to the committee (28 U.S.C. 372(c)(9)(A)). The committee is required to give notice to the judge or magistrate whose conduct is the subject of the complaint, and he or she has the right to appear before the committee in person or by counsel, present oral and documentary evidence, compel the attendance of witnesses and the production of documents, and cross-examine adverse witnesses (28 U.S.C. 372(c)(11)(B)).

After concluding its investigation, the committee is required to file with the circuit judicial council a "comprehensive written report" which is to include the committee's findings and recommendations for judicial council action

(28 U.S.C. 372(c)(5)). In turn, the judicial council if it so chooses may conduct a further investigation (28 U.S.C. 372(c)(6)(A)). The Act provides that upon consideration of the committee's report or the conclusion of any subsequent investigation, the council may censure the judge privately or publicly, may order that for a temporary period no further cases be assigned to the judge, may ask the judge to retire voluntarily, may certify the judge's disability, or may take such other action as it considers appropriate, other than removal from office (28 U.S.C. 372(c)(6)(B)). The Act specifically precludes removal from office of "any judge appointed to hold office during good behavior" (28 U.S.C. 372(c)(6)(B)(vii)), and diminution of a judge's salary is not an available sanction. If the Council determines that an Article III judge has engaged in conduct "which might constitute one or more grounds for impeachment," the council is required to certify that determination to the Judicial Conference (28 U.S.C. 372(c)(7)(A)-(B)). The judicial council must provide notice of its decision to both the complainant and the judicial official (28 U.S.C. 372(c)(6)(C)), both of whom are entitled to petition the Judicial Conference for review (28 U.S.C. 372(c)(10)).[3]

Like the council, the Judicial Conference is empowered to conduct an additional investigation.[4] The Conference is authorized to impose the sanctions authorized in 28 U.S.C. 372(c)(6)(B) (28 U.S.C. 372(c)(8)). If the Conference "concurs in the determination of the council, or makes its own determination, that consideration of impeachment may be

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[3]The judicial council may in its discretion refer any complaint to the Judicial Conference at an earlier stage of the council's deliberations.

[4]The Judicial Conference is authorized by 28 U.S.C. 331 to exercise the authority provided in 28 U.S.C. 372(c) through a Standing Committee. The Conference has established a Committee to Review Circuit Council Conduct and Disability Orders to exercise its responsibilities to review council orders issued under 28 U.S.C. 372(c)(6).

warranted, it shall so certify and transmit the determination and record of proceedings to the House of Representatives" (*ibid.*).

2. Two district court judges filed a complaint under 28 U.S.C. 372(c) against petitioner, a United States District Judge for the Southern District of Florida, in March 1983.[5] The complaint alleged that petitioner had engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts and had violated several canons of the Code of Judicial Conduct. Its specific allegations referred both to conduct charged in an indictment filed in 1981, on which petitioner was acquitted, and to other conduct and to statements by petitioner in the course of the criminal proceedings.[6]

Pursuant to Section 372(c)(4) of the Act, the Honorable John C. Godbold, Chief Judge of the Eleventh Circuit, issued an order appointing, in addition to himself, four other judges to a committee to investigate the allegations in the complaint.[7] The committee appointed an attorney in private practice to serve as its lead investigator and obtained access to the materials of the grand jury which had indicted petitioner (see *In re Petition to Inspect & Copy Grand Jury Materials*, 735 F.2d 1261 (11th Cir. 1984), cert. denied, No. 85-1189 (Oct. 9, 1984)).

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[5]We refer to Judge Hastings as "petitioner" in this brief. He is the sole petitioner in No. 85-1301 and the lead petitioner in No. 85-1609.

[6]The indictment charged petitioner with conspiring with an attorney to obtain a bribe (see *United States* v. *Hastings*, 681 F.2d 706 (11th Cir. 1982), cert. denied, 459 U.S. 1203 (1983) (holding that the Impeachment Clause does not bar indictment of a sitting federal judge)).

[7]In addition to Chief Judge Godbold, the four other judges on the Investigating Committee include two district court judges, Sam C. Pointer and William C. O'Kelley, and two circuit court judges, Gerald Bard Tjoflat and Frank M. Johnson.

3. Petitioner brought suit in the United States District Court for the District of Columbia in December 1983 to enjoin the committee from proceeding with its investigation. He alleged inter alia that the Act, by authorizing the judicial councils to investigate and discipline individual judges, violated the separation of powers doctrine and that the Act on its face violated due process guarantees. The district court rejected petitioner's claims (85-1301 Pet. App. 85-144). It held, contrary to the contention of the government defendants, that the commencement of the investigation made these issues sufficiently concrete to present a justiciable controversy (*id.* at 112-114). With respect to the separation of powers challenge, the court held that the Act posed no threat to the independence of the judiciary. It reasoned that "the Framers never intended that the independence of any officeholder, including judges, be so absolute as to threaten the integrity and orderly functioning of that officeholder's branch of government" (*id.* at 117). The court held that the Act on its face provided ample assurance of due process (*id.* at 136-140).

The court of appeals affirmed the district court's dismissal of petitioner's constitutional challenges, but it did so on ripeness grounds (85-1301 Pet. App. 1-84). Because the committee appointed by Chief Judge Godbold had not completed its investigation, the court said, "[a]nything might happen in the proceedings initiated against appellant, from early dismissal to a recommendation of impeachment. Of the powers the Act vests in the judicial administrative organs, few, some, or many may be invoked against appellant" (*id.* at 32). To avoid determining constitutional issues " 'in broader terms than are required by the precise facts to which the ruling is to be applied,' " (*ibid.*, quoting *Rescue Army* v. *Municipal Court of Los Angeles*, 331 U.S. 549, 569 (1947)), the court declined to adjudicate petitioner's

constitutional claims.[8] The court added that petitioner "has available his constitutional challenge to the validity of the Act in every one of the situations in which he is exposed to the threat of injury. Thus, he may interpose his constitutional arguments, *e.g.*, as a defense to a subpoena" (85-1301 Pet. App. 40).[9] The court of appeals subsequently denied petitioner's petition for rehearing en banc without dissent (*id.* at 148).

4. Prior to the decision of the District of Columbia Circuit, the committee had directed that subpoenas be served on petitioner's secretary and on one of his then current and several of his former law clerks. In May 1985, petitioner, his secretary, and one of his former law clerks filed a complaint in May 1985 in the United States District Court for the Southern District of Florida seeking, inter alia, to restrain the enforcement of the subpoenas. The district court dismissed the action on jurisdictional grounds, ruling that only the court of appeals had authority to enforce or invalidate the subpoenas (85-1609 Pet. App. 170-178), and plaintiffs filed a notice of appeal in the Eleventh Circuit. Meanwhile, the committee filed a motion in the Eleventh Circuit for enforcement of the subpoenas, and the two cases were consolidated. The subpoenaed witnesses, two of whom were represented by the same counsel as Judge Hastings, defended against the motion to enforce the subpoenas on

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[8]The court bolstered its conclusion that petitioner's constitutional claims were not ripe by relying on the policy against "rendering judgment on the constitutionality of proceedings *while* the proceedings themselves are going on. * * * [T]he councils and Conference are entitled to a measure of comity sufficient to preclude disruptive injunctive relief by federal courts absent a showing that serious and irremediable injury will otherwise result" (85-1301 Pet. App. 38-39 (emphasis in original)).

[9]Judge Edwards concurred in the judgment, but wrote separately to address what in his view were the substantial constitutional questions raised by the Act.

the ground, among others, that the Judicial Councils Reform and Judicial Conduct and Disability Act violated the separation of powers. The court of appeals notified the United States that the constitutionality of an act of Congress had been drawn into question and the United States intervened in the action.

The Eleventh Circuit panel, comprised of three judges from other circuits because of the recusal of all active judges in the Eleventh Circuit, first ruled that the prospective witnesses had standing to challenge those provisions of the Act "going to the existence and investigatory authority of the Committee" (85-1609 Pet. App. 54). The court noted that the prospective witnesses "were members of Judge Hastings' chambers staff; in declining to testify as to communications between themselves and Judge Hastings, they are invoking a privilege held by Judge Hastings himself" (*id.* at 51 (footnote omitted)). The court concluded that "[i]t seems only reasonable that we should decide whether the very existence of the Committee for its assigned purpose violates the Constitution, before allowing the Committee to intrude upon confidential communications between the judge and his staff" (*id.* at 52).

On the merits, the Eleventh Circuit rejected the subpoenaed individuals' claim that the Act improperly assigned executive functions to Article III judges. It noted that "the investigatory tasks at issue here, including the subpoena power, have the * * * ultimate aim of promoting 'the effective and expeditious administration of the business of the courts,' " and thus could not be considered executive in nature (85-1609 Pet. App. 71-72). The court next ruled that provision of procedures by which Article III judges may investigate complaints against other judicial officers is consistent with the separation of powers. It stated that "a credible internal complaint procedure can be viewed as essential to maintaining the institutional independence of

the courts" (*id.* at 82). The court continued that "while the Act may impose some pressures upon judges' independence, the fact that it places the investigation, and the determination of what actions to take, entirely within the hands of judicial colleagues makes it likely that the rightful independence of the complained-against judge, especially in the area of decision-making, will be accorded maximum respect" (*id.* at 83-84 (footnote omitted)). The court held that several of the possible outcomes of the proceedings, including some of the possible sanctions, "seem unobjectionable" (*id.* at 88). However, it left consideration of the propriety of two of the remedial options open to the judicial councils—forbidding assignment of cases to judges on a temporary basis and issuing a public reprimand—to a case in which they could be assessed in a concrete setting (*id.* at 85-96).[10] Finally, the court held that communications between a judge and his law clerks are subject to a qualified privilege, which it found overridden in this case by the committee's need for certain testimony to further its investigation (*id.* at 131-166).

The mandate of the Eleventh Circuit was stayed pending the filing of a petition for a writ of certiorari. The Eleventh Circuit denied the committee's motion to vacate the stay on May 2 and this Court denied the committee's motion to vacate the stay on May 19. Thus three years after the complaint was filed the investigation has not been completed and is not proceeding.

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[10]The Eleventh Circuit concluded that petitioner's due process arguments were not ripe (85-1609 Pet. App. 111-115). It nonetheless noted "that the provisions of section 372(c)(11)(B) of the Act—providing that the judge under investigation shall be afforded the opportunity to appear before the Committee, present evidence, compel the attendance of witnesses and the production of documents, cross-examine witnesses, and present argument—appear to undercut appellants' substantive argument" (*id.* at 113-114). The court similarly stated that petitioner's other due process challenge—to the combination of investigatory and adjudicatory functions in the Investigating Committee—"fares no better" (*id.* at 114).

ARGUMENT

Petitioner contends (85-1301 Pet. i (Question 2); 85-1609 Pet. i (Question 3)) that the Judicial Councils Reform and Judicial Conduct and Disability Act violates the doctrine of separation of powers.[11] The core of petitioner's argument is that the establishment of procedures by which Article III judges review complaints against other judicial officers undermines the independence of the judiciary. The Eleventh Circuit carefully considered this claim in light of this Court's decisions in *Chandler* v. *Judicial Council*, 398 U.S. 74, 85 (1970). It ruled that the Act's "complaint procedure

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[11]Petitioner also argues in his petition in No. 85-1301, which was filed before the Eleventh Circuit issued its decision, that the District of Columbia Circuit erred in refusing on ripeness grounds to address his challenge to the constitutionality of the Act (Questions 1 and 3). Petitioner argued that the District of Columbia Circuit should have considered his separation of powers argument lest it "be lost amidst a morass of collateral issues" in the Eleventh Circuit (85-1301 Pet. 38). Petitioner's concerns in that regard proved unfounded when the Eleventh Circuit carefully considered his separation of powers argument. Since the Eleventh Circuit has now considered that argument, petitioner's contention that the District of Columbia Circuit erred in declining to consider it is of no continuing importance.

Petitioner also appears to raise his due process argument in his petition in No. 85-1301 (Question 4), although he does not raise that issue in his petition in No. 85-1609. This issue clearly is not ripe for review, as both the District of Columbia and Eleventh Circuits concluded. Moreover, it is clear that the Act provides ample due process guarantees, as both the Eleventh Circuit and the United States District Court for the District of Columbia concluded.

Petitioner makes two contentions in his petition in No. 85-1609 in addition to his separation of powers argument. One concerns which court reviews questions arising from the issuance of subpoenas under 28 U.S.C. 332(d)(1) (Question 1) and the other concerns the privilege protecting communications within a judge's chambers (Question 2). The United States, which intervened in the Eleventh Circuit to defend the constitutionality of the Act, will not discuss those issues at this time; we are advised that counsel for the other respondents in No. 85-1609 will address them.

of which this investigation is a part is, in broad outline, reasonable and not overly threatening to judicial independence" (85-1609 Pet. App. 80)[12] because it neither impedes discharge of the judiciary's core task of adjudicating cases and controversies nor allows a sister branch to encroach upon the powers reserved to the judiciary (*id.* at 74-95). We believe that the decision of the Eleventh Circuit on this issue was correct and that review by this Court is not warranted in the absence of a conflict in the circuits.

In *Chandler* the Court sanctioned the creation and operation of the circuit judicial councils under the Administrative Office Act of 1939. While the Court did not reach the merits of Judge Chandler's claim that a council could not remove cases from his docket, the Court stated that "[w]e see no constitutional obstacle preventing Congress from vesting in the Circuit Judicial Councils, as administrative bodies, authority to make 'all necessary orders for the effective and expeditious administration of the business of the courts within [each] circuit' " (398 U.S. at 86 n.7 (citation omitted)).[13] The Court further noted that "if one judge in any system refuses to abide by such reasonable procedures [set

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[12]The court found it necessary to judge the procedure only "in broad outline" because the only ripe issue was whether the Act constitutionally authorized the investigation and the issuance of the subpoenas.

[13]That statement disposes of petitioner's argument that the Act is unconstitutional because it assigns executive powers to judicial officers. As the Court recognized in *Chandler* (398 U.S. at 86 n.7) the judicial councils exercise administrative responsibilities in the interest of their own branch, not as part of the executive branch. Thus the question whether judges may perform nonadjudicatory functions at the behest of another branch is not raised, as the Eleventh Circuit concluded (85-1609 Pet. App. 62-74).

by the judicial councils] it can hardly be that the extraordinary machinery of impeachment is the only recourse" (*id.* at 85; see also *id.* at 96-103 (Harlan, J., concurring)).[14]

In enacting the Judicial Councils Reform and Judicial Conduct and Disability Act, Congress responded to this Court's suggestion in *Chandler* (398 U.S. at 86 n.7) that it clarify and formalize the judiciary's authority to make "all necessary orders for the effective and expeditious administration of the business of the courts." As the Judicial Conference resolved prior to enactment of the bill, "legislation placing authority in the judicial branch itself is both compatible with long-standing concepts of separation of powers and desirable in terms of maintaining the ultimate objective of an independent judiciary worthy of public confidence" (*Judicial Tenure and Discipline*, *supra*, at 67). The Eleventh Circuit agreed, finding that "[t]he judiciary as a whole, including the colleagues of complained-against judges, has an interest in seeing that nonfrivolous complaints are looked into, to the end that the judge, and the system he exemplifies, be exonerated or, if not, that the public perceive that the system has undertaken to police itself" (85-1609 Pet. App. 81). Indeed, the court noted that without such judicial machinery, "pressures from the public and legislature might result in withdrawal of needed financial support or in the creation of investigatory mechanisms outside the judicial branch which, to a greater degree than

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[14]Indeed, the judiciary has long been empowered by Congress to "make and establish all necessary rules for the orderly conducting business in the said courts, provided such rules are not repugnant to the laws of the United States" (Act of Sept. 24, 1789, ch. 20, § 17, 1 Stat. 83; see *Wayman* v. *Southard*, 23 U.S. (10 Wheat.) 1, 42 (1825)). Establishment of the Judicial Conference and the judicial councils in effect codified and made uniform what had previously been the practice in most circuits. See Fish, *The Circuit Councils: Rusty Hinges of Federal Judicial Administration*, 37 U. Chi. L. Rev. 203 (1970).

the Act, would threaten judicial independence" (*id.* at 82-83).[15]

But while the Act allows the judiciary to "put [its] own house in order," it does not sanction interference with the consideration of individual cases. To prevent this, all complaints that are "directly related to the merits of a decision or procedural ruling" must be dismissed (28 U.S.C. 372(c)(3)) so that the administrative process cannot be used as an alternative to appeal, or to influence any decision in a pending case. Thus the establishment of this peer review mechanism does not intrude upon each judge's primary function " 'to say what the law is' " (*United States* v. *Nixon*, 418 U.S. 683, 703 (1974), quoting *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)), or interfere with the adjudicative process.[16]

Most important, whatever action is taken—exoneration of the judge, censure, other administrative action, or certification of the record to the House—remains within the discretion of the judicial branch. The Act does not allow a coordinate branch to participate in any way in the review process. If one starts from the *Chandler* premise that there must be some mechanism, short of impeachment, to discipline judges who engage in conduct that their peers deem

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[15]Petitioner suggests (85-1609 Pet. 25-27) that, while it is apparent that some body must be able to consider complaints against federal judges, it does not follow that that tribunal must have investigative powers. That contention obviously lacks merit, since no meaningful consideration could be accorded complaints without the power to investigate them.

[16]Petitioner suggests (85-1609 Pet. 30-31) that the pendency of an investigation may make a judge less "fearless and unbeholden" and may be perceived by litigants as affecting the impartiality of a court reviewing the judge's decisions. We do not think these speculative arguments are consistent with the rationale of *Chandler*.

prejudicial to the " 'effective and expeditious administration of the business of the courts' " (398 U.S. at 86 n.7 (citation omitted)) surely the best mechanism is one supervised by the judiciary itself. The Eleventh Circuit reached the common sense conclusion that "far more serious separation of powers objections would have arisen had these same powers been conferred upon a permanent agency in the executive (or legislative) branch" (85-1609 Pet. App. 73-74 (footnote omitted)).[17] Finally, we emphasize, as did the Eleventh Circuit (*id.* at 80) that the only separation of powers issue decided below is whether the Act "facially and in broad design, is constitutional in respect to authorizing the current investigation, so that the subpoenas may be enforced with confidence that the Committee's investigatory proceedings are legitimate." That issue was correctly resolved below. Other issues that may arise during or after the committee's long-delayed investigation can wait for another day.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

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[17]Cf. *Nixon* v. *Administrator of General Services*, 433 U.S. 425, 444 (1977) ("it is clearly less intrusive to place custody and screening of the materials within the Executive Branch itself than to have Congress or some outside agency perform the screening function").